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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 857

UNITED STATES GYPSUM COMPANY, A CORPORATION,
Petitioner,

vs.

NATIONAL WAR LABOR BOARD, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Your Petitioner, United States Gypsum Company, a corporation, respectfully prays for a writ of certiorari to review the judgment herein of the United States Court of Appeals for the District of Columbia, which judgment reversed an order of the District Court for the District of Columbia overruling a motion of Respondents herein for a dismissal of the complaint herein and for summary judgment. (J. A. 95)[1]

1. "J.A." refers to the joint appendix in the court below, which constituted the printed record therein. It appears in the printed record in this court at pages 1-96. "R." refers to the record in the court below, which comprises pages 97-102 of the printed record in this court. The complete transcript of the record of the trial court has been filed in this court.

Opinions Below.

The opinion of the court below (R. 98-99) is reported in ..... U. S. App. D. C. ....., 145 Fed. (2d) 97.

There was no formal opinion by the District Court. The court's decision was announced from the bench upon the conclusion of the oral argument.

Jurisdiction.

The judgment of the court below was entered on October 23, 1944. (R. 100.)

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended. (Sec. 347(a), Ch. 9, Title 28, United States Code.)

Statement of the Matter Involved.

This suit was brought in the District Court for the District of Columbia to enjoin Respondents, the National War Labor Board and its members, and the Director of Economic Stabilization, and the Board of Economic Stabilization, and its members, from taking any action to compel Petitioner to comply with a Directive Order of the National War Labor Board entered on May 31, 1943, and for a judgment declaring the rights and legal relations of Petitioner with respect to such order.

At the outset it is important to bear in mind that the Respondent, National War Labor Board, prior to the commencement of this suit, construed said order as compulsory upon Petitioner, as constituting "compulsory arbitration" and specifically threatened to enforce said order, or cause the same to be enforced against Petitioner. The threats of enforcement specifically made in the course of the show-cause hearing on June 24, 1943 went to the extent of the

extinction of Petitioner's business if it did not comply with said order.

The assertion of Respondents that the Board's order was "advisory" only and did not fix or determine the legal rights of the parties was, so far as Petitioner is concerned, made for the first time after the present suit was brought, and is the exact opposite of the position taken by the Board before the commencement of the suit.

Petitioner's Warren, Ohio, plant, formerly engaged in the manufacture of metal lath, is now engaged in the manufacture of expanded metal grating, stair treads, platforms and other expanded metal specialties for use on merchant ships, warships, and tanks. (J.A. 7.)

There had been no interruption of work at the plant nor was any such interruption threatened or imminent among Petitioner's employees. (J.A. 7-8.)

Petitioner and the Union agreed upon all terms and conditions of employment except for the demand of the Union for a retroactive wage increase to May 20, 1942 (the date of expiration of the theretofore existing contract) and for maintenance of membership and check-off. (J.A. 8-10.) The Board, in its said Order of May 31, 1943, allowed the retroactive wage increase to July 20, 1942 and directed that Petitioner include in its labor contract with its employees the Board's standard clause for maintenance of membership and check-off. The maintenance of membership provision would require Petitioner to discharge any employee who withdraws or is expelled from the Union. The provision for check-off would require Petitioner to collect for the Union all Union dues and initiation fees due it. (J.A. 14-15.)

The Directive Order in question was mandatory in form. By it the Board "directs" (1) that the company "shall

make" the wage increase in question, and (2) that the provisions for maintenance of membership and check-off "shall be incorporated" in the contract between the parties. (J.A. 14.)

Petitioner paid the retroactive wage, leaving in dispute only the question of maintenance of membership and check-off.

By formal letter to the Board and upon hearing, Petitioner challenged the Board's order upon the ground that by requiring the inclusion of the said provisions for maintenance of membership and check-off, it invaded Petitioner's constitutional rights, and in addition required Petitioner to violate the National Labor Relations Act. (J.A. 16-18; 18-20.)

Following receipt by the Board of Petitioner's said letter the matter was set for hearing before the Board on June 24, 1943 by a telegraphic order upon Petitioner to show cause why it should not comply with the said order. (J.A. 18.) Apparently the real purpose of the show-cause hearing was specifically to make a matter of record the Board's contention that its order of May 31, 1943 was final, binding and compulsory upon Petitioner and that Petitioner would be required to comply therewith.

During the course of the hearing Wayne L. Morse, Compliance Officer of the Board, declared that its order was binding upon, and enforcible against Petitioner; that the Board had the power of "compulsory arbitration"; that the Board would urge the exercise of all of the war powers of the President as were necessary in order to enforce compliance and that the very life of the Board depended upon complete compliance and that defiance of the Board would not be permitted. Mr. Morse further stated at the hearing that it made no difference whether Petitioner remained in business or not if the choice the Government had

was to permit it to remain in business or to protect the no-strike, no-lockout policy of the Government; that the challenge to the Board must be met with all the forces of the Government necessary to meet it and that the Government was justified in taking the necessary time to compel compliance if the Board was to preserve the principles upon which the whole enforcement policy rested. (J.A. 20-23.)

Mr. Morse further, at the hearing, quoted from and specifically put into the record the Board's opinion in the so-called Little Steel case (1 W.L.R. 325), wherein it was specifically stated that there was no basis for questioning the power of the President to order what amounted to compulsory arbitration which he had entrusted to the Board, and that those who challenged the decision of the Board challenged the war powers of the President. It further appeared that in the Little Steel case the Board had said;

> "As Commander in Chief in time of war the President's authority extends not only to matters of strictly military nature or to the problems directly related to military activity, but also to whatever phases of civilian life must be controlled in order to prosecute the war successfully." (1 W.L.R. at p. 353.)

Reference was also made in the Little Steel opinion to the seizure of the properties of the *Toledo, Peoria & Western Railroad Company* (Case No. 48, 3 W.L.R. 518) for failure of that company to comply with an order of the Board with respect to which seizure the Board said that it had recommended that the properties be operated until such time as the company agreed to comply with the Board's decision. (1 W.L.R. at p. 358.) The Board's views thus expressed in the instant case were in precise conformity with its established policies and views as stated in other decisions, both before and after the decision here.

S. A. Woods Machine Company, 2 W.L.R. 159; *J. Greenebaum Tanning Co.*, 10 W.L.R. 527; and *U. S. Vanadium Company*, 13 W.L.R. 527. In the *Vanadium* case the Board said that it had the same power with respect to the settlement of labor disputes, and its orders were as binding and enforcible, prior to the enactment of the War Labor Disputes Act as after the enactment of that Act.

The Board's order has deprived Petitioner and its employees of the benefits of the labor contract embodying the terms and conditions of employment agreed upon between them. The declared construction by the Board of its said order, to the effect that the order was final, binding and compulsory, was enough to destroy Petitioner's employer-employee relationship with its employees. And, moreover, the threat inherent in the Board's order as thus construed by it has had the effect of depriving Petitioner of its right to conduct its business according to its free will and in accordance with law.

On June 25, 1943, the day after the show-cause hearing before the Board in the instant case, the War Labor Disputes Act was enacted over the President's veto. That Act gave legislative status to the National War Labor Board and authorized it, in the case of a labor dispute, "to decide the dispute and provide by order the wages and hours and all other terms and conditions (customarily included in collective bargaining agreements) governing the relations between the parties." The Act expressly provided, however, that in making any decision the Board should conform to certain statutes, including the National Labor Relations Act.

Under date of August 16, 1943 the President issued Executive Order No. 9370 entitled an order "authorizing the Economic Stabilization Director to take certain action in connection with the enforcement of Directives of the Na-

tional War Labor Board." It was provided in said order that in order to effectuate compliance with the Directive Orders of the National War Labor Board in cases which the Board reported to the Director of Economic Stabilization that its orders had not been complied with, the Director was "authorized and directed" to issue such Directives as he might deem necessary, among others "(a) to other departments or agencies of the Government directing the taking of appropriate action relating to withholding or withdrawing from non-complying employers any priorities, benefits or privileges extended, or contracts entered into, by executive action of the Government until the National War Labor Board has reported that compliance has been effectuated." (J. A. 29.)

Thereupon, on September 23, 1943, the complaint herein was filed. Without setting out the allegations of the complaint in detail, the complaint charged the issuance of the Board's order of May 31, 1943, the position of Petitioner taken with respect thereto, the holding of the show-cause hearing on June 24, 1943, the statements of the Board with respect to the compulsory effect of said order and the threats to enforce said order against Petitioner; the passage of the War Labor Disputes Act and the promulgation of Executive Order No. 9370. The complaint specifically charged that since the show-cause hearing "the Board has certified to or has reported to the President the fact that the Petitioner had declined and continued to decline to comply with the Board's said Directive Order of May 31, 1943" (J. A. 32); that the direction to the Director of Economic Stabilization embodied in the Executive Order of August 16, 1943 "was intended by the President as a specific direction to said Director of Economic Stabilization" to issue some one or more of the Directives specified in said Ex-

ecutive Order "against employers (including plaintiff) [Petitioner] who have not complied with the Directive Orders of the Board entered against such employers respectively." (J. A. 32.) It was then alleged that pursuant to such Executive Order the said Director of Economic Stabilization "is required to, will and is about to issue some one or more of the Directives specified" in said Executive Order "directed against plaintiff" (J. A. 32-3); that Petitioner, at its said Warren plant, enjoyed certain priorities, benefits and privileges of the nature referred to in said Executive Order which were necessary for the manufacture of the products at said plant and which, if withheld or withdrawn from Petitioner, would prevent its continued successful operation of said plant; and that the "said Board has reported to the said Director of Economic Stabilization" that Petitioner had not complied with the Order of May 31, 1943 "and said Director of Economic Stabilization and other departments or agencies of the Government unknown to plaintiff [Petitioner] but acting under the direction of said Director are about to, or have taken, action to withhold or withdraw" from Petitioner some or all of said priorities, benefits or privileges "for the sole purpose of compelling" Petitioner to accept said Order of May 31, 1943 "and will continue to do so unless restrained" by order of the Court. (J. A. 33.)

Respondents filed their motions to dismiss the complaint and for summary judgment. (J. A. 46.)

The motion to dismiss asserted that the Court lacked jurisdiction over the subject matter and also failed to state a claim against any of the defendants upon which relief could be granted. (J. A. 46.) The jurisdictional objection rested upon the contention (1) that no "controversy" existed sufficient to give the District Court jurisdiction, and (2) that the suit was against the United States.

On brief in the District Court and in the court below, Respondents urged, in support of their contention that the complaint failed to state a claim against them, or any of them, upon which relief could be granted, first, that Petitioner was not entitled to injunctive relief because it had failed to show that it had been or would be damaged irreparably by any action or threat of action by any of the Respondents; that the Board's order was "not self enforcing," and that the members of the War Labor Board in law and in fact were not charged with the enforcement of the order by employment of legal sanctions for failure to comply therewith. It was further urged that inasmuch as the complaint had charged that the War Labor Board had reported Petitioner's noncompliance to the President there was nothing further for it to do.

As to the Economic Stabilization Director, or the Economic Stabilization Board or its members, it was urged that none of them had threatened to enforce the Board's order, or to take any action against Petitioner for its noncompliance with such order; that the Economic Stabilization Director had disclaimed any power to invoke the sanctions specified in Executive Order 9370 in a case like the instant one, and that the functions of the Economic Stabilization Board were unrelated to Executive Order 9370, and in any event were purely advisory.

In support of its contention that Petitioner was not entitled to any declaratory relief it was urged again that there was no "case of actual controversy" between Petitioner and any of Respondents since, as it was said, the Board's order was not self enforcing and "did not fix or alter the legal rights of the parties." Furthermore it was urged that Executive Order 9370, for the reasons stated, did not apply to the Board's order here involved and there

had been no threats to apply against Petitioner any sanctions pursuant to Executive Order 9370.

It was further urged that inasmuch as the complaint challenged the validity of "compulsory arbitration" attempted to be put into effect by the executive branch of the Government, the validity thereof was not open to question inasmuch as the President himself was not a party to the suit. It was urged that the constitutional validity of Executive Order 9017, which created the National War Labor Board and the orders of the Board pursuant thereto, did not, therefore, present a "case of actual controversy."

In support of the motion for summary judgment Respondents filed the affidavit of Lloyd K. Garrison (J. A. 46-47) which incorporated in it a letter from the Director of Economic Stabilization to the Chairman of the National War Labor Board. (J. A. 48.)

The affidavit stated (J. A. 47) that the Board's order had been issued on May 31, 1943 prior to the enactment of the War Labor Disputes Act; that on August 16, 1943 the President had promulgated Executive Order No. 9370; that the Director of Economic Stabilization, in a letter dated October 13, 1943 to the Chairman of the National War Labor Board (a copy of which was annexed to the affidavit) had "expressed himself to the effect that his power to invoke the sanctions specified in Executive Order 9370 relates only to Directive Orders of the National War Labor Board issued pursuant to the War Labor Disputes Act of June 25, 1943"; and that "Consequently the Director of Economic Stabilization has neither threatened to take action, nor taken action, to compel compliance with the Directive Order of the National War Labor Board challenged in this action, which Directive Order was issued prior to the War Labor Board Disputes Act." (J. A. 47.) In the letter referred to (J. A. 48) the Director of Economic

Stabilization stated that he understood that some question had arisen as to the applicability of Executive Order 9370 to orders of the Board issued prior to the effective date of the War Labor Disputes Act; that the Executive Order must be read and interpreted in the light of the President's letter which accompanied its promulgation; and that the President had stated in his letter that Congress had intentionally left the enforcement of Board orders to executive action. The Vinson letter then stated that Executive Order 9370 was evidently designed to supply the executive action to which the President referred and that "It is reasonable therefore to infer that Executive Order 9370 relates only to Directive Orders of your Board issued pursuant to the provisions of the Smith-Connally Act." (J. A. 48.)

Petitioner filed opposing affidavits, first, showing the testimony of the Chairman of the Board and of Mr. Morse before a Special Committee of the House to the effect that they continued to assert that Board orders, whether entered pursuant to the War Labor Disputes Act, or under Executive Order 9017, were binding and compulsory upon the parties; that the terms and conditions of employment determined upon by the Board were imposed upon the parties without their volition and that the provision for maintenance of membership was not in violation of the National Labor Relations Act. (J. A. 50-77.) According to their testimony as shown by the affidavits, the Board, speaking through its said members, seemed to think that any question as to a violation of an employer's constitutional rights or as to whether the provision for maintenance of membership was in violation of the National Labor Relations Act, were matters to be passed upon by the Courts (J. A. 56), but that nevertheless the Attorney General in the in-

stant case had objected to the jurisdiction of the District Court to determine such questions. (J. A. 66-67; 71.) Mr. Morse had also testified that in the *Windsor* case the Board had attempted to get other Government agencies to impose sanctions against that company for failure to comply with the Board's order. (J. A. 69.) However, Mr. Morse also said that he thought that the question as to whether the President had exceeded his war powers is open to review and that if such a question could not be reviewed, "we would be confronted with a dictatorship." (J. A. 72.)

The affidavits further referred to the proceedings against the *S. A. Woods Machine Company* (J. A. 78-90), including the seizure thereof and certain proceedings directed against the *Twentieth Century Brass Works* for its refusal to comply with an order of the Board. (J. A. 91-93.)

The District Court overruled Respondents' motions without formal opinion. (J. A. 95.) Upon special appeal to the Court below (J. A. 95) the order of the District Court was reversed (R. 100). The cause was remanded to the District Court for further proceedings not inconsistent with the Court's opinion (R. 100).

The Court below summarily disposed of the case on the ground that it was ruled by its decision in *Employers Group of Motor Freight Carriers* v. *National War Labor Board*, 79 U. S. App. D. C.—143 Fed. (2d) 145. Undoubtedly, the Court's decision in the instant case was influenced by denial of certiorari on October 9, 1944 in that case. The only difference which the Court could see between the instant case and the *Motor Carriers* case was, according to the opinion, that in the instant case the complaint alleged that non-compliance had been reported to the

Director of Economic Stabilization and to the President, whereas in the *Motor Carriers* case the allegation was that the Board "might make such reports." (R. 98-99.) Also, by way of footnote, it was said, upon the authority of the *Ward* case, that the allegations in the complaint that the Director of Economic Stabilization and unnamed agencies of the Government were about to, or had taken, action to withhold priorities, etc. from Petitioner, were a mere prediction without legal effect. (R. 99.)

The effect of the judgment of the court below is that although the Board's action was claimed by the Board at the time of the commencement of the suit to be binding and compulsory upon Petitioner, and Petitioner was being subjected to specific threats of the enforcement of the order against it, even to the point of the extinction of its business, Petitioner is left wholly without protection even though the Board's order, in its fullest and most literal sense, was "advisory". An explicit threat to enforce the order, even though advisory—even as in a case of a specific threat to enforce an unconstitutional statute—would seem to require the protective processes of the Court, at least to the extent of a judgment declaring the rights, relations, and liabilities of the party against whom the challenged order is directed, with respect to such order. And if as a matter of law, or construction, Executive Order No. 9370 is inapplicable to an order of the Board entered prior to the enactment of the War Labor Disputes Act, and therefore inapplicable in the case of the order here involved, it would seem that Petitioner was entitled to a judgment so declaring, not to an outright dismissal of its complaint.

By requiring a dismissal of the complaint *in toto* Petitioner is left wholly without protection against the threatened, unlawful and illegal action of the Respondents.

Up to the present time, of course, the District Court has been afforded no opportunity to pass upon any of the substantive questions involved—even though Respondents' motion to dismiss the complaint admits the allegations thereof for the purpose of the motion. Specifically, there has been no judicial determination by the District Court as to whether Petitioner may be required to enter into any particular contract at all, or whether it may be compelled to agree to the provision of maintenance of membership or to the provision for check-off, or whether the provisions for maintenance of membership and check-off are, or are not, in direct violation of the National Labor Relations Act. The mere holding of the court below that the Board's order was "advisory" settles none of these questions, if, as is the case, Respondents nevertheless have threatened, and for aught that appears, intend to enforce the order against Petitioner, if not in one way (by judicial action) then in another (by executive action)—either by way of plant seizure or by the imposition of sanctions as provided for in Executive Order No. 9370.

Petitioner is constrained to observe that no matter how the court below has seen fit to characterize the Board's order in its opinion herein and in its opinion in the *Motor Carriers* case and in the *Ward* case, the Government obviously feels no constraint therefrom in the face of the dismissal of Petitioner's complaint herein. Respondents still regard the order as binding upon Petitioner and enforcible against it by whatever species of executive action the Executive Branch of the Government sees fit to invoke.

And notwithstanding what is said by Mr. Garrison and Mr. Vinson concerning Executive Order No. 9370 and no matter how the court below construed that order in the *Motor Carriers* case as not being applicable to orders of the Board entered prior to the enactment of the War Labor

Disputes Act, there is nothing in the present record which precludes the application of Executive Order No. 9370 to the instant case, or affords any protection to Petitioner against such executive action if its complaint herein is to be dismissed and it is to be denied even the protective influence of a declaratory judgment.

Some additional detail appears in the statement in the accompanying brief, to which reference is hereby had.

Questions Presented

1. Where the National War Labor Board entered its order against Petitioner, mandatory in form, and, as a part of the record in the case, specifically asserted that the order was binding and compulsory upon Petitioner, and threatened its enforcement against Petitioner, did Petitioner have the right to apply to the District Court for relief either by way of injunction or by way of a declaratory judgment declaring the rights and other legal relations of Petitioner with respect to such order?

2. Does the mere fact that after the commencement of the suit Respondents claimed that the order was advisory only and did not fix the legal rights of the parties prevent Petitioner from securing the relief sought?

3. Does the mere fact that the court below has held the Board's orders to be "advisory" justify the dismissal of Petitioner's complaint, which dismissal will deny Petitioner any right to the relief sought by its complaint and will leave it wholly without protection against the threatened enforcement of the order?

4. Even if the Board's order were only "advisory", should Petitioner's complaint be dismissed in the face of the Board's specific threats of enforcement, or is Peti-

tioner not entitled at least to a judgment declaring its rights and legal relations with respect to the order?

5. What is the essential nature of the Board's orders? Can they be merely "advisory" and at the same time enforcible by executive action? Or, if the order is enforcible in any way or by any means, was not Petitioner entitled to a judicial determination by the District Court as to whether the order violated its constitutional rights, or required it to enter into a contract specifically in violation of the National Labor Relations Act? Is not the order under such circumstances reviewable?

6. Is the present suit, thus seeking a judicial determination of said questions, a suit against the United States?

7. Does the complaint herein seeking a judicial determination of such questions state a claim or cause of action? Did the complaint show the existence of a "controversy" sufficient for purposes of federal court jurisdiction?

8. Did the complaint herein state a claim or cause of action when it asserted the entry of the Board's order of May 31, 1943 and specifically charged that the Director of Economic Stabilization had or was about to impose some or all of the sanctions designated in Executive Order No. 9370 in order to compel compliance by Petitioner with the Board's said order?

9. Did the Garrison affidavit, either with or without the Vinson letter, present any evidentiary matter for the consideration of the court?

(1) Were the following statements in the Vinson letter:

> "Evidently, therefore, Executive Order 9370 was designed to supply this executive action to which the President referred, and which was necessitated by the passage of the War Labor Disputes Act.

"It is reasonable, therefore, to infer that Executive Order No. 9370 relates only to Directive Orders of your Board issued pursuant to the provisions of the Smith-Connally Act."

and the statement in the Garrison affidavit relative to the Vinson letter:

"Consequently the Director of Economic Stabilization has neither threatened to take action, nor taken action, to compel compliance with the Directive Order of the War Labor Board challenged in this action, which Directive Order was issued prior to the enactment of the War Labor Disputes Act,"

matters of fact or other evidentiary matter, or were they merely conclusory, affording no basis whatsoever for a motion for summary judgment?

10. Was the court below in error in holding that the allegations of the complaint that the Director of Economic Stabilization—

"has or is about to issue some one or more of the Directives specified in paragraphs (a), (b), and (c) of Executive Order 9370"

and that—

"The said Director of Economic Stablilization and other departments or agencies of the government unknown to plaintiff [Petitioner] but acting under the direction of said Director, are about to or have taken action to withhold or withdraw from plaintiff [Petitioner] some or all of said priorities, benefits, or privileges for the sole purpose of compelling plaintiff [Petitioner] to accept said Directive Order of May 31, 1943, and will continue to do so unless restrained by order of this court,"

constitute a mere prediction without legal effect and do not constitute statements of fact?

11. Was the court below in error in reversing the order of the trial court denying Respondents' motions to dismiss the complaint and for summary judgment, thereby in effect

directing the granting of such motions, without at least a direction that there be a determination by at least a declaratory judgment of the non-binding effect of the Board's order, and of what the rights and relations of Petitioner were with respect to such order? Or, should not the court below, in its remanding order have given a specific direction to the District Court as to what further order should there be entered?

Reasons for Granting the Writ.

1. Notwithstanding denial of certiorari in *Employers Group of Motor Freight Carriers, Inc., et al.* v. *National War Labor Board, et al.*, No. 350, this term, and in *Montgomery Ward & Co., Inc.* v. *National War Labor Board, et al.*, No. 538, this term, certiorari should be granted in the instant case. Denial of certiorari in those cases imports no opinion on the merits thereof. *United States* v. *Carver*, 260 U. S. 482. See also *Higgins* v. *Smith*, 308 U. S. 473, where it appeared that this court had denied certiorari in numerous cases involving the question, although the decisions therein were found ultimately to be erroneous. See also *Avery* v. *Commissioner*, C. C. A. 7, 84 Fed. (2nd) 905, certiorari denied 299 U. S. 604, and *Lockhart* v. *Commissioner*, C. C. A. 3, 89 Fed. (2nd) 143, certiorari denied, 302 U. S. 7, 11, although subsequently the decisions of the courts of appeals were deemed erroneous. *United States* v. *Pleasants*, 305 U. S. 357. And see also *Hamilton Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251.

Rule 38 (5) (c) of this court provides that:

> "Certiorari may be granted where the United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution or a treaty or statute of the

> United States which has not been, but should be, settled by this court; or where that court has not given proper effect to an applicable decision of this court."

Apart from the provisions of the remainder of Rule 38, the provision above quoted justifies the granting of the writ in the instant case.

The situation which has resulted from the characterization by the court below of Board's orders being merely "advisory" has created an intolerable situation in view of the fact that Respondents, and the Government itself, through its Executive Branch, still treat the orders as binding and compulsory upon the employer and propose to enforce them, and continue to enforce them, by whatever executive action they see fit to invoke. Assuming the court below regards orders of the Board as of precisely the same character as those of the Old Railroad Labor Board,[2] and although this Court, in the second of the Pennsylvania cases,[3] said that the orders there involved were not enforcible in "any way" (267 U. S. 203 at p. 216), Respondents still insist, contrary to the apparent views expressed by the court below, that the orders of the Board are compulsory and enforcible. And, in the instant case, it appears that the Board itself, as part of the record of the case, specifically threatened Petitioner with the enforcement of the order to the point of the extinction of Petitioner's business if it did not comply.

The order of the court below in the instant case reversed the District Court and simply remanded the cause for further proceedings not inconsistent with the court's opinion. Substantially the same type of order was entered in the *Ward* case. In those two cases the District Court had denied motions for a dismissal of the respective complaints and for summary judgment. In the *Motor Carriers*

2. *Pennsylvania Railroad* v. *Labor Board*, 261 U. S. 72; and *Pennsylvania Railroad System, etc.* v. *Pennsylvania Rd. Co.*, 267 U. S. 203.

3. 267 U. S. 203.

case, however, 79 U. S. App. D. C. ....., 143 Fed. (2) 145, the District Court had granted the motions to dismiss and for summary judgment, without differentiation between the two motions, and the Court below there affirmed. We can only assume, therefore, that the "further proceedings" directed by the Court in the instant case were to be a general order of dismissal of the complaint.

Notwithstanding its orders in these three cases the court below, nevertheless, passed upon the questions involved in the suits at least to the extent of saying that the Board's orders, whether entered before or after the enactment of the War Labor Disputes Act were "advisory." To that extent the Court would seemingly have sustained the jurisdiction of the District Court as against the jurisdictional grounds urged in support of the motions to dismiss. To that extent, it would seem that there should at least have been entered a judgment under the Declaratory Judgments Act declaring the rights of Petitioner with respect to the Board's order.

Was there, or wasn't there, a controversy between Petitioner and Respondents at the time of the commencement of the suit? If the court below was of the opinion that there was no controversy because the order was "advisory" and therefore not reviewable,[4] the decision, under the circumstances of the instant case, is clearly opposed to innumerable decisions of this court where a controversy has been held to exist. See particularly *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227; *Stark* v. *Wickard*, 321 U. S. 288.

In the *Ward* case (79 U. S. App. D. C. ....., 144 Fed. (2d) 528) the Court's decision rested in part upon the point that it was said the complaint did not state "the

4. *Employers Group of Motor Freight Carriers, Inc.* v. *National Labor Relations Board*, 79 U. S. App. D. C. ....., 143 Fed. (2d) 145, which the court below in the instant case said was controlling.

form, substance, time, place, or circumstances of any threat. We must not ignore the possibility that if the complaint meant to allege threats it would say what form they took and when and to whom they were made. We understand the complaint to mean not that all 22 of the defendants, or any of them have made threats, but that the plaintiff considers the situation threatening." (144 Fed. (2d) 528 at p. 531.) In the instant case the opinion ignores all of the allegations of the complaint with respect to the specific threats made by the Board against Petitioner, so that while in the Ward case the presence or absence of threats was deemed important, the presence of specific threats in the instant case seems to have become unimportant.

Likewise, in the same way, in the *Motor Carriers* case (79 U. S. App. D. C. ....., 143 Fed. (2) 145) it was said that there "no one threatens and no one could maintain either judicial or administrative proceedings against the appellants upon the authority of the Board's order. In these circumstances there is no occasion for review of the Board's order." (143 Fed. (2d) 145 at p. 147.) Whatever the court saw fit to say to the effect that no one "could maintain * * * administrative proceedings against the appellants upon the authority of the Board's order" the fact remains, and is a matter of public knowledge, that the Board and the executive branch of the Government and its chief law officer not only assert that administrative proceedings may be maintained against noncomplying employers, but they are actually employing such administrative proceedings—by plant seizure, or by action such as Executive Order No. 9370—upon the authority of the orders of the Board and to enforce compliance therewith.[5]

5. And the court will recall that Mr. Morse himself testified that in one case—the Winsor case—the Board had endeavored to induce other Government agencies to withdraw priorities and the like from that company because of its failure to comply with the Board's order. Under such circumstances it is idle to say that "there is no occasion for review of the Board's order."

Furthermore, it was said in the *Motor Carriers* case (143 Fed. (2d) 145 at p. 150) "The Board has not reported or threatened to report appellant's failure to comply with its order." The complaint in the instant case specifically alleges that the Board had certified or reported to the President Petitioner's refusal to comply with the order. (J. A. 32.) Obviously, Respondents' motion to dismiss admits this allegation and there is no adequate affidavit filed whatsoever in support of the motion for summary judgment denying said allegation. The only affidavit filed in support of such motion was the Garrison affidavit which, although utterly insufficient for the purpose intended, dealt only with the applicability of Executive Order 9370.

The questions presented in the *Motor Carrier* case were totally different from those in the instant case. In the *Motor Carriers* case plaintiffs were attempting to prosecute a sort of appeal to the court for a review *on the merits* of the Board's order. That case involved only a question of wage increase and no claim was made, as we understand it, of any invasion of constitutional right or, specifically, that the employer there was being required by the Board's order to act in palpable violation of the National Labor Relations Act. In the instant case the Board's order requires Petitioner, as it claims, not only to enter into a specific contract with its employes, but to include in that contract provisions which are in direct and palpable violation of the National Labor Relations Act. In other words, Petitioner is being required by the Board's order to do the very thing in principle that this court in the *Wallace* and *Richwood* cases[6] said an employer could not be required to do.

In the *Ward* case the application for certiorari was founded principally upon the contention that Board orders

6. *Wallace Corporation* v. *N. L. R. B.*; *Richwood etc. Union* v. *N. L. R. B.*, Nos. 66-67 (this term—U. S.—decided Dec. 18, 1944.

under the War Labor Disputes Act were binding orders fixing the legal rights of the parties concerned—differing in this regard from the orders of the old Railroad Labor Board. However it was also urged that the Board could be enjoined from failing to comply with the procedural requirements of the War Labor Disputes Act. These are not the questions presented in the instant case, nor are those contentions advanced in support of certiorari here. Here the Board's order was entered wholly without legislative sanction, was asserted by the Board to amount to compulsory arbitration, and specific threats of enforcement were made by the Board. Whether advisory or not Respondents proposed to enforce the order against Petitioner, and hence Petitioner came into court for relief. The judgment below is to deny any relief to Petitioner, leaving Petitioner liable to any enforcement action any of Respondents or any other person may see fit to institute—wholly without protection. As a matter of fact the opinion of the court below is no part of the *judgment*, and the judgment is to be one of dismissal of the complaint. For Respondents to deal with the Board's order as compulsory would be no violation of either the *judgment* of the court below or of the judgment of the District Court entered pursuant to the mandate of the court below.[7]

7. In 33 C. J. at p. 1104, it is said: "* * * The reasons assigned by the court for the judgment entered do not constitute a part of the judgment. Therefore a judgment or decree of the court controls the written opinion, and if they are at variance, the former prevails and determines the rights of the parties." In respect of this last statement there are cited *Harriman* v. *Northern Security Co.*, 197 U. S. 244; *Abraham* v. *Casey*, 179 U. S. 210.

In 21 C. J. S., at p. 414, it is said that an opinion "cannot prevail against the final order or decision." See also *Stone* v. *United States*, 164 U. S. 380 at p. 383; *United States* v. *Shoshone Tribe*, 304 U. S. 111; *United States* v. *Wells*, 283 U. S. 102.

Unquestionably a court may look to an opinion of another court for certain purposes. But in the final analysis the judgment is controlling. Cf. *M. E. Blatt* v. *United States*, 305 U. S. 267. It must follow then as a matter of necessity that in case of conflict the judgment and not the opinion controls. We again point out, therefore, that the characterization by the court below of the Board's order as being advisory gives no protection to Petitioner against the judgment dismissing its complaint.

Whatever may have been the situation in the *Motor Carriers* case and in the *Ward* case, the record in the instant case would seem to preclude any out-and-out dismissal of Petitioner's complaint and would seem to require at least the entry of a declaratory judgment. Coming up as these questions of practice and procedure do in the instant case, and inasmuch as they not only involve but destroy the constitutional rights of Petitioner, certiorari should be granted under other explicit provisions of Rule 38. Subdivision (5)(b) of the Rule mentions cases where a circuit court of appeals "has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court." And requiring an out-and-out dismissal of Petitioner's complaint in the face of threatened enforcement of the order, no matter what may be the character of the order—advisory or not—it may also be said that the court below "has so far departed from the accepted and usual course of judicial proceedings" as to call for an exercise of this court's power of supervision.

Is it conceivable that had the Declaratory Judgment Act been in effect at the time the Old Railroad Labor Board cases came before this Court, this Court would not have directed the entry of some sort of a judgment declaring the rights of the railroads with respect to the orders of the Board? Or, had it appeared that the Board there had not only entered orders against the railroads but was asserting their compulsory effect upon them, and was threatening the roads with the enforcement of the order, is it conceivable that this Court would have put the railroads out of court with a dismissal of their complaint and would have denied them any relief whatsoever against the threatened, illegal action of the Board? Of course under the old

equity practice a decree dismissing a complaint for want of equity was a determination against the complainant on the merits. But although a complaint is dismissed it makes a large difference as to the reasons for the dismissal. Cf. *Utah Fuel Co.* v. *Bituminous Coal Commission*, 306 U. S. 56.

Even if an administrative order is unenforcible in law, or "advisory", if the administrative officials concerned assert its compulsory effect and threaten its enforcement, it would seem to us that without question the party against whom such order is directed and who is being threatened with its enforcement has the right to resort to the courts so that he may be adequately protected by the protective processes of the Judicial Branch of the Government against the unlawful action of the administrative officers concerned.

Coupled with all this it is now perfectly apparent, if it wasn't at the time made clear to the courts below, that it is not Respondents' contention that the Board's order is merely "advisory"—meaning thereby wholly unenforcible in any way, at any time, in any place, or by anybody, as in the old Railroad Board cases—but rather that the Board's order is in law binding and compulsory upon the employer and may be enforced against him, by *executive* action, if not by judicial process.

In May and June, 1944, a Select Committee was appointed by the House to investigate the seizure of Montgomery Ward & Company. The report of that Committee, containing the testimony before it and its findings, is now a public document. There appears from the testimony, not only of the Chairman of the National War Labor Board, Mr. Davis, and of Mr. Morse, the Board's Compliance Officer, but also of the chief law officer of the Government, that they still claim that the orders of the Board in law constitute a species of compulsory arbitration, that they are

binding upon the parties and are enforcible by executive action. The distinction there taken seems to have been that the Board orders were not enforcible by judicial action, but that they were enforcible by executive action, even though "lip service" is given to the proposition that an employer would have the right to come into court and have the court determine whether his constitutional rights have been invaded and that the court would have jurisdiction to make such determination. (Report, p. 37.)

It was also recognized, however, that plant seizure was but one species of executive action that might be employed to enforce compliance on the part of the employers, albeit, the only speices available to compel compliance by the union (Report, p. 54), but that there were other species of executive action to compel compliance by the employer. Obviously, Executive Order No. 9370 and the imposition of sanctions pursuant thereto is another such species of executive action.

We also think that because of the public interest here involved and the importance of the questions presented, the court can take judicial notice, namely, that the Government has but just now seized the Ward plants in Chicago and has filed suit in the District Court there for a determination, among other things, of the right of the Government to make such seizure to enforce conformity with the Board's Order.[8]

8. It is true that the seizure is also sought to be justified under the provisions of the War Labor Disputes Act. Nevertheless, the Government is put to its other alternative of justifying the seizure apart from the War Labor Disputes Act because of the limited character of that Act with regard to seizures. The Government's complaint there specifically states that there is a valid, existing, substantial controversy with respect to the rights of the parties. How can it be claimed in the instant case that the Board's order and its threatened enforcement against Petitioner presents no justiciable controversy?

The material parts of the current seizure order in the *Montgomery Ward & Company* case are as follows:

"Whereas, * * * in the exercise of the authority conferred upon it by the War Labor Disputes Act, the National War Labor Board

We want it distinctly understood that in referring to the current Ward seizure we are not litigating their controversy. We do think, however, that this court, upon the present application, is entitled to know the positions of the parties hereto with respect to the character of the Board's orders. And the same comment applies with respect to our reference to the testimony of the Board officials and of the Attorney General before one or the other of the House committees with respect to such matters, and particularly with reference to their asserted right to enforce such orders by administrative or executive action.

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has issued directive orders deciding the labor disputes that gave rise to the said disturbances; that the said directive orders provide terms and conditions of a kind customarily included in collective bargaining agreements to govern the relations between the parties to such disputes; * * * that Montgomery Ward & Co., Incorporated, has refused to put into effect the terms and conditions contained in these directive orders; that as a result of the refusal of Montgomery Ward & Co., Incorporated, to put into effect the terms and conditions contained in the directive orders issued by the National War Labor Board in the dispute in the plants and facilities of Montgomery Ward & Co., Incorporated, in Detroit, Michigan, a serious strike involving approximately 1800 employes is now in progress in that city. * * *.

"Whereas, * * * the preservation of the wartime structure of labor relations and the prevention of interruptions of war production depend upon the peaceful settlement of labor disputes by the War Labor Board in the manner provided for by the Congress * * *, that the persistent refusal of Montgomery Ward & Co., Incorporated, to put into effect the terms and conditions contained in directive orders issued by the National War Labor Board pursuant to the War Labor Disputes Act threatens to destroy both the wartime structure of labor relations and the procedure established by the Congress for the peaceful settlement of wage disputes during the war, and unduly impedes and delays the war effort, and

* * * * *

"Whereas, * * * the National War Labor Board has considered those disputes and issued directive orders determining and providing methods for their adjudgment; that the labor unions involved have expressed their willingness to adjust the disputes in accordance with the directive orders of the National War Labor Board, but Montgomery Ward & Co., Incorporated, have persistently refused to accept the provisions of the directive orders as a basis for the adjustment of such disputes; and that this refusal unduly impedes and delays the successful prosecution of the war,

NOW, THEREFORE * * * it is hereby ordered as follows:

"1. The Secretary of War is hereby authorized and directed * * * to take possession of the plants and facilities of Montgomery Ward & Co., Incorporated, * * *."

Is such order anything but a thinly veiled order of seizure for the express and sole purpose of enforcing compliance with the Board's order, which apparently the court below in its decision in the *Ward* case said was advisory and need not be obeyed by the company?

The Attorney General, in his testimony before the Committee, left no question of doubt as to the Government's position with regard to the enforcibility of Board orders. While he was there addressing himself particularly to the War Labor Disputes Act, he nevertheless stated explicitly, "if the War Labor Board is not obeyed, then the Executive has the right to take over the plants specifically," (Report, p. 142) and "to enforce them [Board orders] the President has the power to seize." (Report, p. 143.)

This Court has never passed upon the precise question which is involved in the instant case. The matter involved is of wide public importance and the consequences of the decision below are of sweeping importance. The lack of any final and conclusive answer by this court to the problems involved has created an intense feeling of unrest and fear on the part of the public at large that acts of the Government—without even the semblance of legislative sanction—will be permitted to go unchecked and uncontrolled, and that the private citizen, although he is supposed to be living under a constitutional government, is to be denied access to the courts for a judicial determination of his belief that his constitutional rights are being destroyed.

Of what avail is it to the citizen to be told by a reviewing court that the Board's order is "advisory" when the executive branch of the Government, with all of the powers of the military behind it, tells him that it is binding upon him and that if he does not obey, his property will be taken from him by force, or his business will be destroyed?

This court in the very hard cases involving detentions of and restraints upon American citizens of Japanese ancestry, has firmly adhered to the principle that the protective processes of the courts will be extended even to them, and that even in time of war the Constitutional guaranties to the citizen must be observed. What must be the situation

in cases like the instant case where citizens are denied relief notwithstanding their constitutional rights have been flagrantly trampled upon by administrative action of the Government. As we have said, even Mr. Morse, in his testimony before the Select Committee above referred to, had the grace to say that unless a citizen had the right to have his constitutional rights passed upon by the courts we would have a dictatorship. He knew whereof he was speaking.

The District Court attempted to protect Petitioner to the extent of hearing its claim. The court below denies that protection to Petitioner. If, upon a claim of constitutional right, judicial processes fail or are denied, what then is left to the citizen but to meet force with force? A lawless citizen can be controlled or punished. A lawless government is above any orderly or corrective process.

What is to happen then if, by denying access to the courts, constitutional government is subverted and destroyed?

Whatever this court may think of Petitioner's claim of constitutional privilege, and whether it is held right or wrong in its claim, it is essential that this court decide whether Petitioner has the right, at least, to be heard.

It is intolerable that the courts should lend themselves to a situation where, in the one breath, before the court, it is contended that the Board's order is advisory only, for the purpose of avoiding any judicial restraint upon administrative action, and in the next breath, out of court, it is contended that the Board's order is enforcible by executive action and that the employer, Petitioner here, is to be denied the protective processes of the Judicial Branch of the Government as against the specific threats of enforcement of the order.

As stated, Petitioner's complaint, under the judgment of the court below, is to be dismissed. Where law enforcement officers threaten a citizen with the enforcement of a statute which they admit to be unconstitutional, is the citizen to be denied protection against such threatened action merely because the officers themselves admit such unconstitutionality? Such concession on their part would seem to require the entry of a decree—not the dismissal of the complaint. How does such a case differ from the instant case?

2. This case involves questions of vast public importance. It is proper that this court pass upon the question of the applicability of the Declaratory Judgments Act to a case like the present. It is being urged by Respondents that the case presents no "controversy." In *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227, certiorari was granted for the sole purpose of determining whether or not the matters there involved presented a controversy under the Declaratory Judgments Act. There is even greater reason in the instant case to grant certiorari so that the question may be conclusively determined. The Declaratory Judgment Act authorizes a judgment declaring the rights and legal relations of the plaintiff, wholly without regard to whether other relief may or may not be had. (U. S. C. Title 28, § 400(1); Rule 57.) All that is necessary to entitle a plaintiff to relief by way of declaratory judgment is that there be "an actual case or controversy", that the issue be "actual and adversary", and that the judgment is not a "medium for securing an advisory opinion in a controversy which has not arisen." *Coffman* v. *Breeze Corporations, Inc. and U. S.* No. 71, this term, decided January 2, 1945 ..... U. S. ....., and cases cited therein.

Respondents herein asserted in the District Court that no controversy existed. The court below has directed the

dismissal of Petitioner's complaint. Obviously the court below has held against the entry of a declaratory judgment. In so doing, it has palpably failed to follow the decisions of this court.

3. In view of the vast public importance of the questions and matters presented, and in view of the position taken by Respondents and by the Government through its Executive Branch that Board orders are enforcible, this Court should determine whether or not such orders do or do not constitute "compulsory arbitration" and if so, whether such compulsory arbitration can be made effective in time of war by the Executive Branch of the Government acting without legislative authority, and whether or not, if such "compulsory arbitration" is valid, the employer can be required to enter into a contract in specific violation of the National Labor Relations Act. Or, if because of lack of opportunity as yet for a decision of these questions by the District Court this Court is unwilling at this time to determine such questions, then it is respectfully submitted that certiorari should be granted, the judgment of the court below should be reversed and the cause should be remanded to the District Court for a determination of the issues raised by the complaint. It is no answer to the present application for certiorari that the court below has said that the Board's order was advisory—not when Respondents claim that the order is enforcible by administrative or executive action. By requiring a dismissal of Petitioner's complaint the practical effect of the judgment of the court below is to sustain as valid orders of the Board which in all reality constitute "compulsory arbitration awards" although they are called "advisory"—and to sustain such orders as valid where they are issued solely under the direction and powers of the executive branch of the Government, wholly without legislative sanction. In this regard the importance

of the question presented is more basic than that in the *Ward* case, had that case directly challenged the constitutionality of the War Labor Disputes Act as providing for compulsory arbitration. While the War Labor Disputes Act was there involved, the petition for certiorari raised no direct question as to the invalidity of the statute itself. The petitioner there urged that the statute provided for enforcible orders, but that whether the Board's orders were enforcible or merely advisory the Board's failure to follow the procedural requirements of the Act could be enjoined. The instant case presents an entirely different question. Here we have an assertion that the executive branch of the Government acting alone may exercise in time of war all of the war powers otherwise vested in the National Government as such. If the executive department, acting through the National War Labor Board, can effectuate a system of compulsory arbitration, and if its orders are enforcible by administrative or executive fiat, and if the executive branch of the Government can declare and establish a national policy with respect to employer-employee relationships, and in so doing is free from any judicial inquiry as to any asserted invasion of constitutional rights, and if the executive branch may do all this without legislative sanction, then obviously the executive branch of the Government is supreme, and the legislative branch of the Government could not in any way take away or limit the powers of the executive branch. Likewise the executive branch could, acting under the same claim of all-inclusive and unlimited war powers, prorogue the courts themselves. Such possibility is by no means imaginary. In the saboteurs case[9] the President's order expressly denied access to the courts, and while this court held that such denial could not prevent a recourse to the courts to determine questions of jurisdiction and ques-

9. *Ex Parte Quirin*, 317 U. S. 1.

tions of constitutional right, it is not wholly improbable that the executive branch of the Government, in order to prevent judicial inquiry as to the constitutionality of its acts in time of war, might order the functions of the judicial branch to be suspended so long as the war shall continue. As a matter of fact the claims advanced by the executive branch of the Government as to the extent of its "war powers" knows, and can know, no limit. What does one think was meant by the statement of the Board in its opinion in the *Little Steel* case that as "Commander-in-Chief in time of war the President's authority extends not only to matters of strictly military nature, or to problems directly related to military activities, but also to whatever phases of civilian life must be controlled in order to prosecute the war successfully."[10] And of course implicit in

10. Among others, the following excerpts from the Board's opinion in the *Little Steel* case are illuminating:

"The National War Labor Board was created through the exercise of the President's war power. Hence the jurisdictional powers and duties of the Board stem directly from the war powers of the President." (1 W. L. R. at p. 350.)

"The objections to the jurisdiction of the Board overlook the fact that there is inherent in the war powers of the President the authority to take such steps as may be necessary to prevent and settle labor disputes which threaten to disrupt the successful prosecution of the war." (1 W. L. R. at p. 350.)

"It is immaterial that the issues involved in the dispute are over wages and union security. It is immaterial that in peacetime the parties might conceivably be justified in raising some legal objection to the enforcement of an arbitration award of which they do not approve. In wartime there is no basis for questioning the power of the President to order what amounts to compulsory arbitration for the settlement of any labor dispute such as the instant one which threatens the war effort. The President, having entrusted this duty to the National War Labor Board, it follows that those who challenge a decision of the Board challenge the war powers of the President." (1 W. L. R. at p. 351.)

"In view of the vital importance of the steel industry to the successful prosecution of the war, it is only fair to make clear to the parties concerned in this dispute that any attempt on their part to stay the carrying out of this decision must be construed by the Board as a challenge to the war powers of the President. In such event the Board will not hesitate to recommend that the war powers be exercised to whatever degree may be necessary to meet successfully such a challenge." (1 W. L. R. at p. 358.)

In the *Vanadium* case, 13 W. L. R. 527, the Board stated explicitly that in exercising its powers of compulsory arbitration in the settlement of labor disputes it was not circumscribed in any way by the War Labor Disputes Act. And such was the general effect of the position taken by Mr. Davis, Mr. Morse, and the Attorney General in their testimony before the respective committees of the House heretofore referred to.

that statement is the theory that the President's decision as to what must be controlled in order to prosecute the war successfully is conclusive.

The saboteurs case and the Japanese cases are wholly opposed to any such theory of government. Nevertheless, by its judgment in the instant case, and others, the court below has put into practical operation the theory of government thus asserted by the executive branch thereof.

In the Japanese cases executive action ultimately found, and had to find, its support in Acts of Congress. And in those cases it is to be noted that opportunity was afforded to the citizens involved to have their constitutional rights passed upon.

That is all that Petitioner is seeking in the instant case —an opportunity to have the judicial branch of the Government determine its claim of constitutional privilege, and to determine whether it may be required by executive fiat to violate applicable Acts of Congress.

That such questions are of vast importance appears, first, from the fact that "compulsory arbitration" has been held to be unconstitutional in peacetime by this Court. (*Wolff Packing Co.* v. *Industrial Relations Co.*, 262 U. S. 522.) Whether the Congress, in time of war, can provide for the compulsory arbitration of labor disputes is not before the Court at this time inasmuch as no claim is made that the Board's order here involved is supported by the War Labor Disputes Act. Here we have an attempt by the Government acting through its Executive Branch, alone, to provide for compulsory arbitration. In the second place, the decision of this Court in the *Wallace* and *Richwood* cases, Nos. 66 and 67, this term, decided on December 18, 1944, ____ U. S. ____, would seem to dispose of any contention that a provision for maintenance of membership and check-off can be imposed upon an employer as against

the explicit provisions of the National Labor Relations Act.

4. This Court should further review the question as to the sufficiency of the Garrison affidavit. The question is of importance in Federal procedure under Rule 56 relating to motions for summary judgment. In the *Motor Carriers* case where the affidavit was substantially, if we understand it correctly, the same as the affidavit in the instant case, the court below said that the Director of Economic Stabilization "has stated in a letter to the Board" that Order 9370 applied only to Board orders issued under the War Labor Disputes Act. (143 Fed. (2d) 145, at p. 150.) This is not an accurate statement of the Vinson letter.

In the *Ward* case affidavits were filed by both Mr. Garrison and Mr. Vinson. They are not at all of the same character as the affidavit filed by Mr. Garrison in the instant case.

In its complaint herein Petitioner alleged that the Director of Economic Stabilization and other agencies were about to or had taken action to impose sanctions pursuant to said Order 9370. That allegation, notwithstanding the characterization thereof by the court below as a mere prediction (R. 99), is not denied by Respondents, but on the contrary stands admitted by their motion to dismiss. The Garrison affidavit wholly fails to meet the requirements of Rule 56. If, upon an issue as important as that raised by Petitioner's complaint, the trial court can grant summary judgment upon the strength of such an affidavit as that filed herein by Respondents, the whole purpose of Rule 56 is defeated. Respondents saw fit to file their respective motions prior to answer, as, of course, they had the right to do, Rule 56(b), and we therefore do not have a denial of the allegation in question by any responsive plead-

ing of the Respondents. This court should determine the sufficiency of the allegations in the complaint in such regard, and the sufficiency of the Garrison affidavit. In *Walling* v. *Fairmount Creamery Co.*, C. C. A. 8, 139 Fed. (2d) 318, the court held that "conclusory" affidavits are insufficient upon a motion for summary judgment. The court below in the instant case seems to hold that a conclusory affidavit is sufficient.

5. The court should further review this case to determine whether or not the suit was in effect one against the United States. As pointed out, the court below, by retaining the case sufficiently to express an opinion with regard to the nature of the Board's orders, seems to regard the suit properly brought as against the specific objection in question. And in the *Motor Carriers* case the court below determined the question from the standpoint of whether there was general equitable jurisdiction to enjoin the action of an administrative body rather than from the standpoint as to whether the suit was against the United States. Nevertheless in its opinion it discusses many of the cases against administrative officers in which the question was considered as to whether the suit was against the United States. The holding below was, generally, that the case was not one where an action would lie. (143 Fed. (2d) 145, at p. 147.) And the fact remains that Petitioner's complaint is now to be dismissed. The result, we submit, is contrary to the decision of this court in *Stark* v. *Wickard*, 321 U. S. 288, although the court below gave apparent recognition to that decision. In that case a statute was involved. Here Respondents claim to be acting wholly apart from Statute. There is even more reason for judicial review.

A somewhat comparable situation was involved in *Utah Fuel Co.* v. *Coal Commission*, 306 U. S. 56. There the suit

was against the Coal Commission and although the District Court dismissed the bill on the merits the court below affirmed the dismissal on the ground that the District Court had no jurisdiction. This court granted certiorari and held that the District Court did have jurisdiction although that court properly dismissed the suit upon its merits. If certiorari was allowable in that case, it should be allowed here.

In the case last cited the District Court had passed upon the substantive questions involved in the suit, and therefore when this court agreed with the District Court's disposition of those questions it was proper to affirm the District Court judgment. In the instant case the District Court has been given no opportunity of passing upon the questions submitted to it by Petitioner's complaint, and we therefore assume that the proper order here, if certiorari is granted, is to reverse the court below and send the case back to the District Court for trial.

The procedure followed in the instant case by the court below is not conducive to orderly litigation or to the expeditious disposition of lawsuits. Nor is it within the spirit and intendment of the Rules of Civil Procedure. After the District Court overruled Respondent's motions to dismiss and for summary judgment they obtained leave to prosecute a special appeal to the court below under special provisions of the District of Columbia Code. And upon that appeal the District Court was reversed, as has been heretofore shown. It would have seemed only proper that if the court below had thought there was jurisdiction in the District Court as against the objection that the suit was against the United States or did not involve a "controversy", it would have let the District Court proceed with a trial of the issues involved rather than to short-cut the proceedings

merely upon the inconclusive view that the Board's order was essentially "advisory" only, coupled with an order for the dismissal of Petitioner's complaint. Only upon the theory that Petitioner's complaint stated no claim or cause of action and was not capable of amendment was the court justified in dismissing the complaint. The practice followed by the court below in this regard should not be condoned by this court and certiorari should be granted so that proper practice can be directed. The result of the decision of the court below is to peremptorily and summarily put the Petitioner out of court in the face of threatened action by Respondents—even granting for the sake of argument that the Board's order was "advisory" in its fullest literal sense—without even an opportunity to amend its complaint in any respect whatsoever. Even if it were thought that the allegations of the complaint were insufficient in the respects noted by the court below, there should be some opportunity to amend. See Rule 15. Cf. Rule 8 (f).

The authority is almost overwhelming in the lower federal courts that motions to dismiss are not to be lightly granted, and that before final judgment goes against the plaintiff as a matter of pleading it must reasonably appear that he has no claim or cause of action which can be stated in any form. The new Rules of Civil Procedure simply require that plaintiff state the nature of his claim. (Rule 8.) The rules do not require that evidentiary matters be pleaded, and certainly we know of no more specific allegations of threatened action than those set out in the complaint herein. The court below brushes aside all of these allegations with the cursory holding that the order itself is advisory, just as if a specific threatened enforcement of an advisory order does not entitle a plaintiff to judicial relief.

Summary.

The judgment of this Court as to whether the Board's order amounts to "compulsory arbitration" or is "advisory" only, or, if "advisory" only, is enforcible by "executive action", or, whether if "advisory" only, an employer may still be threatened with its enforcement has become, because of the public importance of the matter involved, a plain necessity without further delay, in order to prevent other protracted litigation, and in order to clarify the situation so that the private citizen may have an authoritative understanding of his relationship with his Government. We are engaged in a war which even now has resulted in untold and immeasurable destruction of human life and property. Even though this Court has consistently adhered, and is now adhering in its most recent decisions, to the position that even in times of war the United States Constitution is a living and continuing charter of liberty, the refusal by a co-ordinate branch of the Government to observe with meticulous care the rights of a private citizen, even in time of war, is a matter of deep concern to the people at large.

In *Ex parte Mitsuye Endo*, No. 70, this term, ... U. S. ....., decided December 18, 1944, this court said that it must assume "that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen." That in interpreting a wartime measure it "must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war." And that this court "must assume, when asked to find implied powers in a grant of legislative or executive authority, that the lawmakers intended to place no greater restraint on the citizen than was clearly and unmistakably indi-

cated by the language they used." This court also referred to the provisions of the Constitution (including there the Fifth and Sixth Amendments), saying that they were mentioned to "indicate the approach which we think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution." There has been in the instant case, by the entry of the Board's order and its threatened enforcement against Petitioner, with the denial of any opportunity to it to have determined its right of constitutional privilege, no sensitive regard for or respect shown for the liberties of the citizen. Can or will this court, in view of the view expressed above, condone or approve the action of the court below in shutting the judicial door in Petitioner's face in its efforts to have its claim of constitutional privilege determined by the courts, and, if in truth, the Board's order lacks binding effect, or is advisory in its fullest legal sense, thereby preventing Petitioner from obtaining judicial relief against the unlawful and illegal threatened enforcement of an order which, in that or any event, it is not required to obey. To correct such a situation the supervisory power of this court over the proceedings of the courts below should be exercised by granting certiorari herein as prayed.

When a controversy exists—and particularly as between the private citizen and his Government—it is vital that the Judicial Branch of the Government, which is the particular branch constituted to determine and decide controversies, should exercise its prerogative to the end that the citizen may know in his dealings with his Government what he may do and may not do, and that the Government itself, or its administrative officials, in its, or their, dealings with a citizen, may know what it, or they, may do or may not do.

It is unfortunate that the District Court was not given an opportunity to pass upon the merits of the substantive questions involved. Had it been permitted to do so, then this Court, as in the *Coal* case,[11] would have been in a position to dispose of the entire controversy once and for all. Technically, this Court might conceive it necessary to send the case back to the District Court for initial disposition there. On the other hand, in the exercise of its broad supervisory powers and in its right to grant certiorari even prior to final judgment, we think it would only be commensurate with justice and in the public interest for this Court to deal with the case, if certiorari is granted, as if the substantive questions were before it for decision.

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this court directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and send to this court a full and complete transcript of the record and of all proceedings before it in the case numbered and entitled on its docket No. 8695, *National War Labor Board, et al., Appellants*, v. *United States Gypsum Company*, a corporation, Appellee, to the end that such cause may be reviewed and determined by this court as provided by law.

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11. *Utah Fuel Co.* v. *Coal Commission*, 306 U. S. 56.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 857

UNITED STATES GYPSUM COMPANY, A CORPORATION,
Petitioner,

vs.

NATIONAL WAR LABOR BOARD ET AL.,
Respondents.

BRIEF ON BEHALF OF PETITIONER HEREIN IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

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Petitioner,

vs.

NATIONAL WAR LABOR BOARD ET AL.,
Respondents.

BRIEF ON BEHALF OF PETITIONER HEREIN IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the court below (R. 98-99) is reported in U. S. App., D. C. ....., 145 Fed. (2d) 97.

There was no formal opinion by the District Court. The court's decision was announced from the bench upon the conclusion of the oral argument.

JURISDICTION.

The judgment of the court below was entered on October 23, 1944. (R. 100.)

The jurisdiction of this court is invoked under section 240(a) of the Judicial Code as amended (Sec. 347(a), Ch. 9, Title 28, United States Code).

STATEMENT OF THE CASE.

The statement included in the accompanying petition for certiorari states in somewhat condensed form what this case is about. Briefly summarizing what was there said the facts are these:

Petitioner owns a plant at Warren, Ohio, formerly engaged in the manufacture of metal lath and now engaged in the manufacture of expanded metal grating, stair treads, platforms and other expanded metal specialties for use on merchant ships, warships, and tanks. (J. A. 7.) There has been no interruption of work at the plant, nor was any such interruption threatened or imminent among Petitioner's employees. (J. A. 7-8.)

Petitioner and the Union had agreed upon all terms and conditions of employment except for the demand of the Union for a retroactive wage increase to May 20, 1942, and for a provision for maintenance of membership and a provision for check-off. (J. A. 8-10.) May 20, 1942 was the expiration date of the theretofore existing contract. The Board in its order of May 31, 1943, which is the order here involved, allowed the retroactive wage increase to July 20, 1942, directed that the Board's standard clause for maintenance of membership and check-off be included in Petitioner's contract with its employees. The provision for maintenance of membership would require Petitioner to discharge any employee who should withdraw or be expelled from the Union. The provision for check-off would require Petitioner to collect from the Union all union dues and initiation fees due it. (J. A. 14-15.)

Unless these provisions were authorized by the proviso in section 8(3) of the National Labor Relations Act

and could validly be imposed upon Petitioner by the order of the Board it would seem obvious that by including such provisions in its labor contract with its employees Petitioner would be in direct violation of the National Labor Relations Act.[1]

The directive order in question was mandatory in form. By it the Board "directed" (1) that the company "shall make" the wage increase in question, and (2) that the provisions for maintenance of membership and check-off "shall be incorporated" in the contract between the parties. (J. A. 14.)

By formal letter to the Board Petitioner challenged the Board's order. (J. A. 16-18.) By its said letter Petitioner asserted that the order was beyond the powers of the Board; that the Board had not been empowered by Congress to order any employer to adopt the provisions for union maintenance and check-off; that under such provisions Petitioner's employees would not be free to resign from the union, and that Petitioner would be compelled to discharge them if they failed to maintain their union membership in good standing; that the order violated those fundamental principles of liberty which Petitioner and its employees then enjoyed; that the employee had the inherent right to work and was doing so and should be free to join or refuse to join or to resign from a union without losing his job, and that Petitioner had the right to be free to employ the person best suited for the work; that the order would require Petitioner to discriminate against its employees in direct violation of the National Labor Relations Act and would compel Petitioner to give support to the Union by the provision for check-off, and to discriminate against its employees if they should resign from the Union, or if the Union should declare them not

1. Cf. *Wallace* and *Richwood* cases, No. 66-67, ... U. S. ....., decided December 18, 1944.

in good standing; that Petitioner respected the right of its employees to join the Union and had no objection to legitimate Union practices, but that Petitioner strongly objected to the Board's attempt to compel it to enter into a contract which Petitioner believed to be illegal, or to compel it to join in a surrendering of its fundamental freedom; that if administrative commissions were allowed to go unchallenged in cases like the present one our constitutional form of government would be imperiled; and that Petitioner desired to continue to obey the law, preserve constitutional government, to maintain management by undivided responsibility, to remain competitive, and to leave its employees the freedom preserved for them by the Constitution and the Bill of Rights. The letter concluded with a statement that "in keeping with good citizenship the company rejects the Board's order."

This letter was followed by a telegraphic order upon Petitioner to show cause why Petitioner should not comply with the order. (J. A. 18.)

The hearing was had on June 24, 1943, and Petitioner, through its counsel, renewed its objections to the order. (J. A. 18-20.) Apparently the real purpose of the show cause hearing was to enable the Board to make a specific record in the case of the Board's contention that the order against Petitioner was final, binding and compulsory upon Petitioner, and that Petitioner would be required to comply therewith.

The complaint then set forth certain statements made during the course of the hearing by Wayne L. Morse, Compliance Officer of the Board, which were clear and unmistakable threats against Petitioner that it would be forced to comply with the Board's order. (J. A. 20-23.)

Mr. Morse specifically referred to the Board's decision in the so-called Little Steel case, and included the opinion

therein in the record in the instant case. The Board made it clear at the hearing that the Board's power and authority under delegation from the President (Executive Order 9017) was that of "compulsory arbitration," that the order was binding upon Petitioner and would have to be obeyed by it. Mr. Morse, in substance, said that it made no difference whether or not Petitioner remained in business if by so doing it endangered the so-called no-strike, no-lockout policy of the Government, and that there was no basis whatsoever for challenging the war powers of the President in providing for such a system of compulsory arbitration.

It appears from the opinion in the Little Steel case that the Board there had said that as Commander-in-Chief in time of war the President's authority extended not only to matters of strictly military nature or to problems directly related to military activity, but also to whatever phases of civilian life must be controlled in order to prosecute the war successfully. (1 W. L. R. at p. 353.)

In substance and effect the contention is that in time of war the President, as such or as Commander-in-Chief, has full and absolute control over not only all military affairs, but also over all civilian economy, and solely through and by himself may exercise all of the war powers of the national government with or without action by the legislative branch of the government. We can imagine no more pernicious, dangerous and subversive theory than that thus announced when we consider that we are living, or are supposed to be living, under a constitutional system of government.

The complaint then set forth the enactment of the War Labor Disputes Act on June 25, 1943 over the President's veto (J. A. 24), and the issuance of Executive Order 9370 by the President on August 16, 1943. (J. A. 28.) By

this last named order, which was entitled as "authorizing the Economic Stabilization Director to take certain action in connection with the enforcement of the orders of the National War Labor Board," the Director of Economic Stabilization was "authorized and directed" to issue such directives as he may deem necessary, among other things, to other departments or agencies of the Government to the end of withholding or withdrawing from a noncomplying employer any priorities, benefits, or privileges extended or contracts entered into by executive action of the Government until the Board had reported that compliance had been effectuated. (J. A. 29.)

It further appears from the complaint that in conjunction with the release of said Executive Order the President addressed a letter to the Chairman of the National War Labor Board to the effect that he was writing regarding the question of compliance with Board orders under the War Labor Disputes Act which, it was said, he and Mr. Davis had been considering. (J. A. 30.) It was said that the War Labor Disputes Act empowered the Board to prescribe the terms and conditions governing the relations between the parties which should be in effect until further order of the Board. (J. A. 30.) Also that "Congress intentionally left the enforcement of these orders to executive action." The President then said that it would be helpful, in the light of their combined experience in dealing with disputes under Executive Order 9017, and more recently under the Act, to define a program for bringing about compliance in the relative few cases in which executive action might become necessary. (J. A. 30.) The President then outlined certain proposed actions. (J. A. 30-31.) The letter also stated that the President was "requesting the Director of Economic Stabilization to direct the application of any or all of such

sanctions in necessary cases upon report by the Board of noncompliance." (J. A. 31.)

The President then stated that he had been informed that during the past eighteen months there had been only seven cases which had had to be referred to him because of "persistent noncompliance." (J. A. 32.) Neither Executive Order 9370 nor the President's letter to Mr. Davis made any specific distinction between the imposing of sanctions to enforce compliance with the orders of the Board entered prior to the enactment of the War Labor Disputes Act or to imposing sanctions with respect to an order of the Board entered subsequent to the enactment of such Act. And at no time since the issuance of Executive Order 9370, and notwithstanding the litgation in the Motor Carriers case, the Montgomery Ward case and the instant case, has the President by any subsequent order limited No. 9370 to orders issued subsequent to the enactment of the War Labor Disputes Act.

The complaint then alleged that the direction to the Economic Stabilization Director embodied in Executive Order 9370 "was intended" by the President as a specific direction to the Director to issue some one or more of the directives specified in the order against employers, including Petitioner, who had not complied with the Board's orders entered against such employers. (J. A. 32.) It was then alleged that pursuant to such Executive Order the Economic Stabilization Director, either as such Director or through the Economic Stabilization Board, "is required to, will, and is about to, issue some one or more of the directives specified in said paragraphs (a), (b), and (c) of said Executive Order directed against Petitioner." (J. A. 32-33.) It was then alleged that Petitioner, at its said Warren plant, enjoyed and had certain priorities, benefits, and privileges of the nature referred to in Executive Order 9370

which were necessary for the manufacture of the products at said plant, and which, if withheld or withdrawn from Petitioner, would prevent its continued successful operation of said plant (J. A. 33.); that the National War Labor Board "has reported to the said Director of Economic Stabilization " that Petitioner had not complied with the order of May 31, 1943, and "said Director of Economic Stabilization and other departments or agencies of the Government unknown to plaintiff but acting under the direction of said Director are about to or have taken action to withhold or withdraw from" Petitioner some or all of said priorities, benefits, or privileges "for the sole purpose of compelling" Petitioner to accept the order of May 31, 1943, "and will continue to do so unless restrained by order" of the court. (J. A. 33.)

The complaint then alleged that neither of said Executive Orders of the President nor the War Labor Disputes Act, nor any other order or Act of Congress, made provision for any procedure in any court of law or equity "in which the propriety of the assumption of authority by the Board to enter said Directive Order of May 31, 1943, or to compel compliance therewith by plaintiff, or of the assumption of authority by the President of the United States to issue said Executive Order of August 16, 1943, or to impose sanctions upon plaintiff for failure to comply with said Directive Order of May 31, 1943, as in said last mentioned Executive Order provided, or of the assumption of authority by the Board or Director of Economic Stabilization or other department or agency of the government to issue any order or take any action as in said Executive Order of August 16, 1943, provided, may be challenged or determined by any court." And that unless the District Court should take jurisdiction of the case Petitioner was without adequate remedy to challenge or attack in any court the right or jurisdiction of Respondents to enforce the provisions of

said order of May 31, 1943, or to compel, by sanctions or otherwise, compliance therewith by Petitioner. (J. A. 33-34.) It was asserted in the complaint that the imposition of sanctions under Executive Order 9370, and the assumption of authority by Respondents to impose the same upon Petitioner as therein provided, constituted an unlawful attempt to collect a penalty from Petitioner for its failure to comply with the terms of said Directive Order of May 31, 1943, and was an attempt to legislate and to usurp the authority of the legislative branch of the Government. (J. S. 34.) The complaint requested certain adjudications by the court as to the validity or authority of the National War Labor Board as claimed and asserted by it, and the constitutional validity of the executive orders in question and of the actions of Respondents thereunder (J. A. 34-38), and for injunctive relief.

Thereupon, without the filing of an answer, Respondents moved to dismiss the complaint, and in the alternative for summary judgment. The motion to dismiss asserted (1) that the court lacked jurisdiction over the subject matter, first, because there was no "controversy" sufficient to give the District Court jurisdiction, and, second, that the suit was against the United States, and (2) that the complaint failed to state a claim against any of the defendants upon which relief could be granted. (J. A. 46.) As to the point that the complaint failed to state a claim upon which relief could be granted it was urged on brief, first, that Petitioner was not entitled to injunctive relief because it had not shown that it had been or would be irreparably damaged by any action or threat of action by any of Respondents, that the Board's order was "not self-enforcing" and that the members of the War Labor Board were not charged with the enforcement of the order by employment of legal sanctions for failure to comply therewith. It was further urged that inasmuch as the complaint had charged

that the War Labor Board had reported Petitioner's noncompliance with the President's order there was nothing further for it to do.

As to the Director of Economic Stabilization and the Economic Stabilization Board and its members, it was said that none of them had threatened to enforce the Board's order or to take any action against Petitioner for its noncompliance with such order, that the Economic Stabilization Director had disclaimed any power to enforce the sanctions specified in Executive Order 9370 in a case like the instant one, and that the functions of the Economic Stabilization Board were unrelated to Executive Order 9370, and in any event were purely advisory.

It was further said that Petitioner was not entitled to any declaratory relief because there again there was no "case of actual controversy" between Petitioner and any of Respondents since, as it was said, the Board's order was not self-enforcing and "did not fix or alter the legal rights of the parties." It was further said that Executive Order 9370, for the reasons stated, did not apply to the Board's order, and that there had been no threats to apply against Petitioner any sanctions pursuant to Executive Order 9370.

It was further said that inasmuch as the complaint challenged the validity of "compulsory arbitration" attempted to be put into effect by the executive branch of the Government, the validity thereof was not open to question inasmuch as the President himself was not a party to the suit. It was urged that the constitutional validity of Executive Order 9017, which created the National War Labor Board, and the orders of the Board pursuant thereto, did not, therefore, present a "case of actual controversy."

In support of the motion for summary judgment Respondents filed the affidavit of Lloyd K. Garrison (J. A. 46-47) which incorporated in it a letter from the Director

of Economic Stabilization to the Chairman of the National War Labor Board. (J. A. 48.) Petitioner filed opposing affidavits. (J. A. 50-93.) These affidavits are discussed in the statement in the accompanying petition for certiorari, to which reference is had.

Respondents' motions were overruled by the District Court (J. A. 95) and the court below allowed a special appeal from such order. (J. A. 95.) Thereafter, on October 23, 1944, the order of the District Court was reversed and the cause was remanded for further proceedings not inconsistent with the opinion of the court. (R. 100.)

In *Employers Group of Motor Freight Carriers, Inc.* v. *National War Labor Board*, 79 U. S. App. D. C. ——, 143 Fed. (2d) 145, which the court below in its opinion herein said was controlling (R. 98), the order of the District Court granting motions there made to dismiss the complaint and for summary judgment was affirmed. It is therefore to be assumed that the court below in its decision in the instant case intends that upon remand to the District Court Respondents' motions are to be allowed and Petitioner's complaint is to be dismissed.

In addition to the foregoing, the court may take judicial notice of the proceedings before, and the testimony given by the Chairman of the National War Labor Board, by Mr. Morse, and by the Attorney General of the United States, before the Select Committee of the House which was appointed to inquire specifically into the seizure of the Chicago plant of Montgomery Ward & Company in the spring of 1944. The Committee's report and the testimony before it are now comprised in a printed report which we understand constitutes a public document.

The court should take cognizance of the views expressed before the Committee by the persons above referred to not merely to show the making of threats, but to show

what is meant by Respondents' contention that the orders of the National War Labor Board are merely "advisory." We are constrained to believe that when the court below used that term in the *Motor Carriers* case, in the *Montgomery Ward* case, and in the instant case, as characterizing the orders of the Board, it meant what this court said in the old Railroad Labor Board cases to the effect that the orders were unenforcible "in any way" and rested solely and entirely for any compulsory effect upon mere public opinion. That is not, however, what Respondents mean by the word "advisory," nor is that their real contention on the question of the binding effect of the Board's orders and their enforcement. Respondents' contention, as is that of the chief law officer of the Federal Government, is that the Board orders, whether entered before or subsequent to the enactment of the War Labor Disputes Act, do in fact and law constitute "compulsory arbitration," that therefore such orders are binding legally upon the employer and must be complied with by him, and that such orders are enforcible by executive action. The Attorney General was very explicit in that regard. He left nothing to the imagination. In the first place he seemed to regard the decisions in the old Railroad Labor Board cases as meaning merely that the orders of the Board there were not enforcible "in the courts." (Committee Report, p. 141.) There was, however, no such limitation in the decision of this court in those cases. The statement was that the orders were not enforcible "in any way"; that they rested for their effect entirely upon public opinion. The Attorney General then said that if the War Labor Board is not obeyed then the Executive has the right to take over the plant specifically. (Committee Report, p. 142.) And that when the Board decided "then to enforce them the President has the power to seize.' (Committee Report, p. 143.)

In the accompanying petition for certiorari we have posed to the court as one of the questions presented as to whether the Board's orders can be both merely "advisory" and at the same time enforcible by executive action. And that is one of the matters which should be dealt with by a declaratory judgment. How the question is to be decided is separate and distinct from the question as to whether or not the decision, whatever it may be, should be made a matter of judgment.

ERRORS TO BE ASSIGNED AND QUESTIONS PRESENTED.

1. The court below erred in reversing the order of the District Court and requiring a dismissal of the suit where it appeared that the National War Labor Board had entered its order against Petitioner, mandatory in form, and, as a part of the record in the case, specifically asserted that the order was binding and compulsory upon Petitioner, and threatened its enforcement against Petitioner.

   (a) The court below erred in not affirming the order of the District Court and in not permitting the District Court to determine the substantive questions presented by the complaint.

2. The court below erred in not holding that the mere fact that after the commencement of suit Respondents claimed that the Board's order was advisory only and did not fix the legal rights of the parties did not prevent Petitioner from securing the relief sought.

3. The court below erred in holding that the mere fact that it considered the Board's orders to be "advisory" justified or required the dismissal of Petitioner's complaint, by which dismissal Petitioner will be denied any relief sought by its complaint, and will be left wholly without protection against the threatened enforcement of the order.

4. The court below erred in holding that notwithstanding that the Board's order might by only "advisory," Petitioner's complaint should be dismissed in the face of the Board's specific threats of enforcement, and that Petitioner should be denied at least a judgment declaring its rights and legal relations with respect to the order.

5. The court below erred in holding that the Board's order was merely "advisory" and at the same time enforcible by executive action.

(a) The court below erred in not holding that if the Board's order was enforcible, or was threatened to be enforced, by administrative action, as was the case presented here, the Board's order was reviewable.

(b) The holding of the court below in the instant case is inconsistent with its holding in the *Motor Carriers* case where it was said as a ground for decision there that "no one threatens administrative proceedings" against the employer "based upon the Board's order." Such administrative proceedings are in fact threatened against Petitioner here, and Respondents and the executive officials of the Government assert that the Board's orders may be made, or are, the subject matter of administrative proceedings.

6. The court below erred in not holding that the District Court should be permitted to pass upon the question as to whether the National War Labor Board could impose a contract of any kind upon Petitioner, and whether the imposition of such contract would violate Petitioner's constitutional rights, and as to whether, by being required to accept the provisions for maintenance of membership and check-off, Petitioner would be required to act in violation of the National Labor Relations Act.

7. The court below erred in not specifically holding that the complaint herein stated a claim or cause of action, and that the complaint showed the existence of a controversy sufficient to give the District Court jurisdiction.

8. The court below erred in not holding that the complaint stated a claim or cause of action when the complaint asserted the entry of the Board's order of May 31, 1943, and specifically charged that the Director of

Economic Stabilization had, or was about to, impose some or all of the sanctions designated in Executive Order 9370 in order to enforce compliance by Petitioner with the Board's said order.

9. The court below erred in not holding that the Garrison affidavit, either with or without the Vinson letter, presented no evidentiary matter for the consideration of the court, and furnished no ground for granting Respondents' motion for summary judgment.

10. The court below erred in holding that the allegations of the complaint that the Director of Economic Stabilization—

> "has or is about to issue some one or more of the directives specified in paragraphs (a), (b), and (c) of Executive Order 9370.
>
> "The said Director of Economic Stabilization and other departments or agencies of the Government unknown to plaintiff (Petitioner), but acting under the direction of said Director, are about to or have taken action to withhold or withdraw from plaintiff (Petitioner) some or all of said priorities, benefits, or privileges for the sole purpose of compelling plaintiff (Petitioner) to accept said Directive Order of May 31, 1943, and will continue to do so unless restrained by order of this court,"

constitute a mere prediction without legal effect and do not constitute statements of fact.

11. The court below erred in reversing the order of the trial court in denying Respondents' motions to dismiss the complaint and for summary judgment, thereby in effect directing the granting of such motions without at least a direction that there be a determination by at least a declaratory judgment of the nonbinding effect of the Board's order and of what the rights and relations of Petitioner were with respect to such order.

SUMMARY OF ARGUMENT.

The District Court Had Jurisdiction Over the Subject Matter of the Complaint.

A. The Complaint Presents a Case or Controversy With Respondents.

1. The court below in its decision in *Employers Group of Motor Freight Carriers, Inc.* v. *National War Labor Board, et al.*, 79 U. S. App. D. C. ....., 143 Fed. (2d) 145, 147, held that the order of the Board entered prior to the enactment of the War Labor Disputes Act was merely "advisory"; that "no one threatened and no one could maintain * * * administrative proceedings against the appellants upon the authority of the Board's order," and that under such circumstances "there is no occasion for review of the Board's order." In the instant case the court holds that the *Motor Carriers* case was controlling. (R. 98.)

In the *Montgomery Ward case*, 79 U. S. App. D. C., ..., 144 Fed. (2d) 531, it was said that the complaint "does not state the form, substance, time, place or circumstances of any threat."

In the instant case the record shows that before the complaint was filed the Board not only had entered its order against Petitioner, but had taken the position that the order was binding upon and enforcible against Petitioner as constituting "compulsory arbitration." And the Board threatens to compel compliance by force. The threats went to the point of threatening Petitioner with the extinction of its business if it did not comply with the order. The specific threats made against Petitioner were made a part of the record in the case upon the occasion of and

through the guise of the show cause hearing. These allegations are all admitted by the motion to dismiss. To make such threats a part of the record in the case was apparently the real purpose of the hearing.

The position of the Board as to the compulsory effect of its orders was in conformity with the views repeatedly expressed by the Board in numerous cases which had come before it both before and after the decision here. The *"Little Steel"* cases, 1 W. L. R. 325; *Toledo, Peoria & Western Railroad Company*, 3 W. L. R. 518; *S. A. Woods Machine Company*, 2 W. L. R. 159; *J. Greenebaum Tanning Company*, 10 W. L. R. 527; *U. S. Vanadium Company*, 13 W. L. R. 527. In addition it appeared from affidavits filed that Mr. Davis, the Chairman of the Board, and Mr. Morse, who was Compliance Officer of the Board, had testified before one of the committees of the House of Representatives that the Board's orders entered under Executive Order 9017 constituted "compulsory arbitration"; that the terms and conditions of employment decided upon by the Board, which included the provisions for maintenance of membership and check-off, were imposed upon the employer against his volition, and that since said orders were binding and compulsory upon such employer, he would be compelled to comply therewith. Furthermore, in addition to certain seizures of plants for the enforcement of the Board's orders, to which Mr. Morse referred, he said that in the *Windsor* case the Board sought to induce other governmental agencies to impose sanctions upon that company for its failure to comply with the Board order. In the *Greenebaum* and *Vanadium* cases the Board held that its orders were compulsory, superseded state law, and that the Board's powers were the same under Executive Order 9017 as they were after the enactment of the War Labor Disputes Act so far as concerned the binding effect of such

orders. An employer must comply even though in so doing he violates the law of the state.

An order of the Board cannot be merely "advisory" and at the same time enforcible by executive or administrative action. In the old Railroad Labor Board cases this court said that the orders of that Board were not enforcible "in any way," and rested for their effect upon mere public opinion. *Pennsylvania Railroad System* v. *Pennsylvania Rd. Co.*, 267 U. S. 203, 216; Id 261 U. S. 72. There was nothing "advisory" about the order in the instant case." The threats as set forth in the complaint were specific, and Petitioner insists that unless it is given relief by at least a declaratory judgment as to the nonbinding character of the order upon it the threats in question will be successful.

Even if the orders are now said by Respondents to be "advisory," and even if the court so holds, such is no reason for denying Petitioner any relief, and in dismissing the complaint, when Respondents have specifically threatened to enforce the order against it.

Prior to the commencement of the suit the order was asserted to be binding and compulsory upon Petitioner, and the Board threatened to enforce the order against it. The concession by Respondents after commencement of suit that the order is merely advisory admits plaintiff's claim and requires without more a judgment awarding Petitioner all appropriate relief.

2. The complaint specifically alleged that the National War Labor Board had reported to the Director of Economic Stabilization Petitioner's noncompliance with the Board's order, and that the Director of Economic Stabilization was about to or had taken action to withhold or withdraw from Petitioner some or all of the priorities, benefits, and privileges referred to in Executive Order 9370

for the sole purpose of compelling Petitioner to comply with the order of May 31, 1943. Nothing in the order itself, or in the President's letter to Mr. Davis, clearly makes any distinction between orders of the Board issued before, and those issued after, the enactment of the War Labor Disputes Act. Executive Order 9370 did not refer to plant seizures under the War Labor Disputes Act, but had to do with administrative enforcement of the Board orders. In his letter to the Chairman of the War Labor Board the President stated that Congress had left the enforcement of Board orders to executive action. The executive branch of the Government may not provide for "compulsory arbitration"—certainly without legislative sanction. "Compulsory arbitration," with executive enforcement thereof, can only mean martial rule. "Compulsory arbitration" of itself is violative of the rights guaranteed by the Federal Constitution.

3. Under the circumstances presented in the instant case Petitioner is entitled to its action against the administrative body involved, and, by injunctive relief or relief under the Declaratory Judgments Act, Petitioner may have its rights determined. See *Stark* v. *Wickard*, 321 U. S. 288. Under the circumstances presented by the instant case a declaratory judgment is proper. *Coffman* v. *Breeze Corporation, Inc. and the United States*, No. 71, this term, decided January 2, 1945, ... U. S. .....; *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227.

A suit may be maintained for declaratory judgment under proper circumstances even in the absence of specific threats. See *Currin* v. *Wallace*, 306 U. S. 1. And a suit may be maintained against the administrative officials having to do with the administration of the challenged act even if they have no enforcement powers of their own. *Currin* v. *Wallace, supra.*

The *Motor Carriers* case was essentially an effort by the employer to have the merits of the Board's order reviewed by the court. In the instant case the character of the order as claimed by Respondents, and its threatened enforcement against Petitioner, created constitutional questions which were proper for submission to the court. In addition Petitioner had the right to have the question determined as to whether it could be required to accept the provisions for maintenance of membership and check-off as against the specific provisions of the National Labor Relations Act.

The contention that both parties here agree that the Board's order was without binding effect is specious. Petitioner contends that the Board's order, claimed to be compulsory and binding as amounting to compulsory arbitration, is violative of its constitutional rights, is therefore void, and in that sense is without binding effect. Respondents contend that the Board's order was advisory, meaning only that it is not enforcible by judicial process but is enforcible by executive action. The court below holds that the order is "advisory," probably meaning "advisory" in its fullest literal sense. But whatever may be the reasons for holding the order to be unenforcible against Petitioner, Petitioner is entitled to its judgment.

B. The Suit Here Is Not in Effect One Against the United States.

A suit against administrative officials is not, under the circumstances presented here, a suit against the United States. *Stark* v. *Wickard*, 321 U. S. 288.

II.

Petitioner Established a Claim Against Respondent Upon Which Relief May Be Granted.

A. Petitioner Stated a Claim Upon Which Injunctive Relief May Be Granted.

Petitioner is entitled to relief in equity. The complaint shows that the threatened enforcement of the order will destroy its property and business. Petitioner need not await the consummation of the threatened injury before it brings suit. Petitioner is entitled to the injunctive process of the court to prevent such injury. Furthermore Petitioner is not to be required to speculate as to what action the Board will take, or to assume the hazard thereof.

While the court may have the right to determine judicially the meaning and effect of Executive Order 9370 as to orders entered prior to the enactment of the War Labor Disputes Act, its determination in that regard should be made the subject matter of a judgment. Petitioner should not be in the position of having its complaint dismissed with the result that there would be no judgment on the record which would have any binding effect upon Respondents. Whatever the views of the court might be as expressed in his opinion, they are not formally a part of judgment itself, and if the judgment is one of dismissal of the complaint Petitioner is denied all remedy.

B. Petitioner Has a Claim Upon Which Declaratory Relief May Be Granted.

Declaratory relief may be granted wholly irrespective of whether any other or further relief may or may not be had. The circumstances presented in the instant case require declaratory relief for Petitioner. *Currin* v. *Wal-*

lace, 306 U. S. 1; *Aetna Life Insurance Company* v. *Haworth,* 300 U. S. 227. Even though the court below were right in holding that the Board's order was merely "advisory," such holding should be incorporated into a judgment so that Petitioner's rights and legal relations with respect to the order will be the subject matter of a judicial and binding determination. Under such circumstances a declaratory judgment might, and probably would, have all of the salutary effect of an injunction. *Great Lakes Co.* v. *Huffman,* 319 U. S. 293. Upon an issue as to the binding character of the Board's order the court may inquire into the constitutional validity of Executive Order 9017. The fact that the President himself is not a party to the proceeding is immaterial. *United States* v. *Lee,* 106 U. S. 196; *Ex parte Quirin,* 317 U. S. 1; *Hirabayashi* v. *United States,* 320 U. S. 81.

III.

Respondents Were Not Entitled to a Summary Judgment.

A party moving for summary judgment must show that there is no genuine issue of fact and that he is entitled to a judgment as a matter of law. (Rule 56.) Nothing in the Garrison affidavit presented any evidentiary fact. Affidavits in support of a motion for summary judgment must be evidentiary in character and not conclusory. *Walling* v. *Fairmount Creamery Co.,* C. C. A. 8, 139 Fed. (2d) 318. All of the allegations of the complaint well pleaded are admitted by the motion to dismiss. It therefore stands admitted for present purpose that the Director of Economic Stabilization is about to take action pursuant to 9370 against Petitioner.

The substantive questions presented by Petitioner, and which have not as yet been passed upon by the District

Court because of the special appeal to the court below and its present decision reversing the District Court, are simple and clearcut. That their answer may be difficult is another question. Grave constitutional questions are presented here, inasmuch as the executive branch of the Government, without legislative sanction, is attempting to declare a national policy with respect to employer-employee relationships, is attempting to provide for a system of compulsory arbitration with "compulsory arbitration awards" enforcible by executive or administrative action—and all of this accompanied by a denial of the right of the citizen to resort to the judicial branch of the Government for a determination of the question as to whether his constitutional rights have been invaded, and whether he is otherwise being required to proceed in direct violation of specific laws passed by the Congress.

While technically this case would ordinarily be sent back to the District Court for determination of such questions, nevertheless this court, in the exercise of its broad supervisory powers over the proceedings of the lower courts, would have the right to take this case and decide all of the questions thus presented. And Petitioner suggests that if certiorari be granted in this case that the parties be directed to file briefs on the constitutional and other questions presented.

ARGUMENT.

I.

The District Court Had Jurisdiction Over the Subject Matter of the Complaint.

A. The Complaint Presents a Case or Controversy With Respondents.

1. The court below, upon the purported authority of its decision in *Employers Group of Motor Freight Carriers, Inc.* v. *National War Labor Board, et al.*, 79 U. S. App. D. C. , 143 Fed. (2d) 145, holds that the Board's order of May 31, 1943 is not reviewable because it is merely "advisory." From its reference in the *Motor Carriers* case to the decisions involving the old Railroad Labor Board cases[2] we assume that the court below used the term "advisory" in the sense that the Board's order was wholly unenforcible in any way, at any time, at any place, or by any person. As said in the *Motor Carriers* case "no one threatened, and no one could maintain • • • administrative proceedings against the appellants upon the authority of the Board's order. In these circumstances there is no occasion for review of the Board's order." (143 Fed. (2d), p. 147.) Also it was said by the court below in the *Montgomery Ward* case:

> "There are 22 defendants. The complaint does not state the form, substance, time, place or circumstances of any threat. We must not ignore the probability that if the complaint meant to allege threats it would say what form they took and when and to whom they were made. We understand the complaint to mean not

2. *Pennsylvania Railroad Company* v. *United States Railroad Labor Board*, 261 U. S. 72; *Pennsylvania Railroad System, etc.* v. *Pennsylvania Railroad Company*, 267 U. S. 203.

> that all 22 of the defendants, or any of them, have made threats, but that the plaintiff considers the situation threatening." (144 Fed. (2d), p. 531.)

Apparently the things thus mentioned by the court below in the other two cases were regarded as of considerable, if not controlling, importance in the disposition of such cases. But in the instant case all of such matters which are present in the instant case have seemingly lost all importance.

The fact remains that before the complaint was filed herein the Board took the position that its order of May 31, 1943 was binding upon, and enforcible against, Petitioner. And the Board threatened to compel compliance by force. Members of the Board authorized to speak for the Board (and no other member of the Board dissented from the views expressed at the time) not only said, at the time of the show cause hearing, that the Board's order was binding and enforcible, but that it was entered pursuant to the power to provide for "compulsory arbitration," which power had been conferred upon the Board by the President. They went further. They said that the order would be enforced against Petitioner; that they would turn to the President for final enforcement, and would urge upon him the exercise of all the war powers as were necessary to secure compliance; that Petitioner's defiance of the Board would not be allowed, and that its challenge to the Board must be met with all the forces of the Government necessary to meet it. They further threatened Petitioner with the extinction of its business if it did not comply with the order.

These specific threats which were set forth in the complaint were a part of the record of the case and apparently the real purpose of the show cause hearing was to make a record in the case of such threats.

The position taken by the Board at the time was in precise conformity with the views repeatedly expressed by the Board in numerous cases which have come before it.[3] The opinion in the *Little Steel* case was quoted at length by Mr. Morse, Compliance Officer of the Board, at the time of the show cause hearing, and was made a part of the record in the instant case in its entirety.

In addition the affidavits filed by Petitioner showed the sworn testimony of Mr. Davis, the Chairman of the War Labor Board, and Mr. Morse before a special committee of the House to the effect that the Board's power under Executive Order 9017 and its orders pursuant thereto were "compulsory arbitration," and that the terms and conditions decided upon by the Board, which included the provisions for maintenance of membership and check-off, were imposed upon the employer against his volition, and that inasmuch as such orders were binding and compulsory upon the employer, the employer would be compelled to comply therewith. In their said testimony reference was made to seizures of plants for the purpose of enforcing compliance with the Board's orders, and in one instance, the *Windsor* case, the Board sought to induce other governmntal agencies to impose sanctions upon that company for its failure to comply with the Board's order.

In the *Greenebaum* case the Board held that its order in requiring maintenance of membership and check-off was compulsory to the extent that it superseded all contrary state legislation, and that notwithstanding the acceptance of such provisions by the employer would subject him to penalties under the state law, nevertheless he must comply with the Board's order.

3. The *"Little Steel" cases*, 1 W. L. R. 325; *Toledo Peoria & Western Railroad Company*, 3 W. L. R. 518; *S. A. Woods Machine Company*, 2 W. L. R. 159; *Greenebaum Tanning Company*, 10 W. L. R. 527; *U. S. Vanadium Company*, 13 W. L. R. 527.

In the *Vanadium* case the Board said that the powers of the Board under the War Labor Disputes Act were no different from what they were under Executive Order 9017 before the War Labor Disputes Act was enacted; that in either event the orders were compulsory and employers must comply therewith.

We have also called the court's attention to the explicit statements of Mr. Davis and Mr. Morse before the Select Committee of the House to investigate the Montgomery Ward seizure in 1944, and to the testimony of the Attorney General before the same Committee, where the Board's position was reaffirmed, and in addition the Attorney General explicitly stated that the Board's orders would be enforced by plant seizure or by other executive action.

The above matters are referred to show the concept of Respondents and of the Attorney General of an "advisory" order.

Under such circumstances, and in view of the existence of specific threats, which the court below thought necessary when it decided the *Motor Carriers* case and the *Montgomery Ward* case, how can it be said that the Board's order was merely advisory in the sense in which that word was used by the court? Can the order be both "advisory" and at the same time enforcible by executive or administrative action? If the Board's order was "advisory" in the sense of the old Railroad Labor Board cases, and enforcible if at all only by force of public opinion, how could the Board or the President or any other administrative official compel compliance with the Board through plant seizure—which would be nothing but the exercise of martial law under such circumstances—or by the imposition of sanctions as under Executive Order 9370, or by other administrative or executive action? And if the order

was enforcible by administrative action, then how could the court below say that the order was not reviewable, when it said in the *Motor Carriers* case that because no one was there threatening administrative proceedings, nor could anyone maintain such proceedings against the employer, based on the Board's order, the order was therefore not reviewable?

According to the Board's threats at the time of the show cause hearing there was nothing "advisory" about the order. The threats, set forth in the complaint, were explicit and were intended to compel Petitioner to comply with the order. And such threats will be successful unless Respondents are either enjoined or the rights of the Petitioner with respect to the order are declared by judgment under the Declaratory Judgments Act.[4] The legal injury here lies in the assertion of the Board that its order is compulsory and in the threats to compel compliance by force.

But even if the order were "advisory" in the fullest sense, as apparently intended by the court below, does the threat and purpose to enforce such an order operate to deny the employer judicial relief against such enforcement? If an administrative official threatens to enforce an unconstitutional statute does the fact that the statute is unconstitutional or is conceded to be unconstitutional by such official, preclude the party against whom such enforcement is threatened from securing relief from the courts? Where a statute is claimed to be constitutional and its enforcement is threatened, does the court then, upon a finding that the statute is unconstitutional, dismiss the plaintiff's bill or does it award injunctive relief or relief by declaratory judgment, as of course? In the old Railroad Labor Board cases there was no situation presented of an assertion by

4. The admonitory character of a declaratory judgment is something like that of an injunction. *Great Lakes Co. v. Huffman*, 319 U. S. 293.

the Board, there, that its orders were compulsory and enforcible, nor had the Board there entered orders, which it was threatening to enforce against the railroads. Is it conceivable that had such been the case this court would have dismissed the complaint and denied the railroads all relief? Or, had the Declaratory Judgments Act been in effect at that time, is it conceivable that this court would have declined by its judgment to declare the rights and relations of the railroads with respect to the Board's orders?

Petitioner insists that a "controversy" arose at the point when the Board entered its order, asserted its compulsory effect, and threatened its enforcement by all means available and Petitioner denied the Board's claim as in violation of Petitioner's constitutional rights of contract and asserted that it could not legally be compelled to comply with the order.

To say, as Respondents say here, or as the court holds, that the order is only advisory, in its literal sense, and is not enforcible at any time or place, or by anybody, and that therefore there is no "controversy" or no "claim" stated against Respondents is an over-simplification of the question and may be said in every case where a public official purports to act beyond the scope of his authority. Everywhere except in the District Court and in the court below the Board's order was "compulsory arbitration" and to be complied with as such under duress of any and all administrative means available. In the District Court and in the court below, however, the Board's order was advisory and did not fix or determine legal rights.

2. Under date of August 16, 1943, the President issued Executive Order No. 9370. (J. A. 28-29.) The complaint charged that the Board had reported to the Director of Economic Stabilization that Petitioner had not complied

with the Board's order and that the Director of Economic Stabilization "is about to or has taken action" to withhold or withdraw from Petitioner some or all of the priorities, benefits, and privileges referred to in the order for the sole purpose of compelling Petitioner to comply with the order of May 31, 1943. (J. A. 33.)

At this point, therefore, we have the added factor that so far as appears from Executive Order 9370 further administrative action or executive action was to be had against all so-called recalcitrant employers, meaning employers, including Petitioner, who refused to accept the orders of the Board. Obviously such action being administrative or executive in nature there could be no action in court instituted by any Government official to impose such sanctions and thereby to compel obedience to the Board's order. Therefore, unless the employer who was the target of such administrative or executive action could institute action himself in an appropriate court for protection against the exercise of such executive or administrative action, such party would find himself subjected to an unconstitutional process of having his property taken away from him and his constitutional rights invaded wholly without remedy. Is he required to wait until the damage has been done?

Whatever may be said of the right of seizure as provided for in the War Labor Disputes Act, there is nothing in that Act or in any Act which authorized Executive Order 9370. Its purported justification was, as stated in the President's letter to the Chairman of the National War Labor Board, that "Congress intentionally left enforcement of the Act" to him. (J. A. 30.) Nothing in Executive Order 9370 had to do with the existence of strikes or interruptions of work, nor with whatever power the President has to seize a plant in the event of a strike or interruption of work. The sanc-

tions in terms were to be imposed for the sole purpose of compelling compliance with the orders of the Board.[5]

(3) It has been held that under such circumstances there is a controversy and that Petitioner's only remedy is in equity or under the Declaratory Judgments Act for a declaration of rights and the legal relations of the parties. The courts have consistently held that relief may be granted against a public officer where he acts without authority to the injury of another and that no one may be left to his uncontrolled and arbitrary action which is unauthorized by law and in violation of private rights. *Utah Fuel Coal Co.* v. *Bituminous Coal Commission* (1939), 306 U. S. 56; *Goltra* v. *Weeks* (1926), 271 U. S. 536; *American School of Magnetic Healing* v. *McAnnulty* (1902), 187 U. S. 94; *Ickes* v. *Fox* (1937), 300 U. S. 82; *Santa Fe P. R. Co.* v. *Lane* (1917), 244 U. S. 492. In *Ex Parte Young* (1908), 209 U. S. 123; *Philadelphia Co.* v. *Stimson* (1912), 223 U. S. 605; *Truax and the Attorney General of the State of Arizona* v. *Raich* (1915), 239 U. S. 33, 37; and *Terrace* v. *Thompson* (1923), 263 U. S. 197, 214, it was held that equity jurisdiction will be exercised to enjoin the threatened enforcement of an unconstitutional statute.

It is not entirely clear as to the views of the court below as to the presence of a "case" or "controversy." Apparently it thought that there was a sufficient case or controversy so as to enable it to pass upon the effect and nature of an order of the Board. However, in the *Motor*

5. Neither the President nor the Board has any power to compel compliance in such a case. This could mean martial rule only as there is no statute providing for enforcement, or specifically for the imposition of such sanctions or penalties. "Compulsory arbitration" infringes liberty of contract and rights of property guaranteed by the Federal Constitution. *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522; Id. 267 U. S. 552; *Wilson* v. *New*, 243 U. S. 332. The power asserted on behalf of the executive branch of the Government is directly opposed to the doctrine laid down in *Ex parte Milligan*, 4 Wall. 2; *Ex parte Quirin*, 317 U. S. 1; *Hirabayashi* v. *United States*, 320 U. S. 81; *Ex parte Mitsuye Endo*, No. 70 this term. ..... U. S. .....; and *Korematsu* v. *United States*, No. 22 this term. ..... U. S. ....., both decided December 18, 1944.

Carriers case it was said that administrative action could be controlled where either (1) the administrative action was directly injurious to legally protected interests of plaintiff, or (2) it furnished a basis for proper judicial proceedings against the plaintiff. (143 Fed. (2d), p. 143.) Under its first classification the court recognized the decision of this court in *Stark* v. *Wickard*, 321 U. S. 288. The instant case comes fairly and squarely in such class. The Stark case involved a statute. There is even greater need for judicial review, when the executive branch is acting wholly without legislative support. See Willoughby on the Constitution, 2nd Ed., § 1093.

In *Coffman* v. *Breeze Corporations, Inc. and the United States*, No. 71, this term, decided January 2, 1945, ... U. S. ....., it was said that all that is necessary to entitle a plaintiff to relief by way of declaratory judgment is that there be "an actual case or controversy," that the issue be "actual and adversary," and that the judgment is not a "medium for securing an advisory opinion in a controversy which has not arisen." That case very clearly shows when a "controversy" is, or is not presented. And see *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227.

In *Pennsylvania* v. *West Virginia*, 262 U. S. 553, no effort to enforce the Act was shown nor was there any claim of any threat of enforcement. In sustaining the suit it was said, through Mr. Justice Vandeventer:

> "One does not have to await the consummation of threatened injury to obtain preventive relief."

In numerous cases the only threat was implicit in the statute itself. *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365; *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498; *Thornhill* v. *Alabama*, 310 U. S. 88.

Under the foregoing cases, had nothing more appeared than the entry of the Board's order and the general contentions of the Board openly expressed and publicly known that such orders were regarded as compulsory upon the employer, Petitioner would have been entitled to relief because of the threat which was implicit in the Board's order itself. However, in the instant case the complaint showed the actual threats made by Respondents for the enforcement of the order. If there was no "controversy" between Petitioner and Respondents when the present complaint was filed then we do not know the meaning of the word. In *Currin* v. *Wallace,* 306 U. S. 1, the court entertained a suit under the Declaratory Judgments Act and for an injunction against the enforcement of the Tobacco Inspection Act on the ground of its unconstitutionality, under which Act the Secretary of Agriculture had power to establish standards and where penalties were imposed for various violations. There was nothing in the Act which vested any particular powers of enforcement in the Secretary of Agriculture, and so far as appears there was no especial threatened enforcement of the Act other than was implicit in the Act itself. There is absolutely no ground for challenging the jurisdiction of the District Court to entertain this suit merely because, as is said, the National War Labor Board itself has no powers of enforcement.

We have heretofore adverted to material distinctions between what was involved in the *Motor Carriers* case and the *Ward* case on the one hand and the instant case on the other, and we have pointed out matters referred to in the opinions in those cases which were deemed of controlling importance, and that in the instant case facts were present which supplied what was lacking in those cases. Furthermore, the *Motor Carriers* case seems to have been a mere attempt on the part of the employers

to secure a judicial review of the merits of the Board's order. In the instant case Petitioner is insisting that by the Board's order and its threatened enforcement its constitutional rights have been invaded, and it is being required to enter into a contract which requires it to violate the National Labor Relations Act.

In both courts below it was speciously argued that both Petitioner and Respondents agreed that the Board's order was without legal effect. Petitioner's insistence was that the Board's order purported to be, and was asserted by the Board to be, binding and compulsory upon Petitioner and enforcible against it, and amounted to "compulsory arbitration" and that such order was therefore unconstitutional and void. This under the principle of the *Wolff Packing Company* case, 262 U. S. 522; 267 U. S. 552. In that sense, of course, like any unconstitutional act or statute, it would have no "legal effect." On the other hand, up to the time of suit the Board was claiming that the order was compulsory and was not merely advisory, and was valid and enforcible against Petitioner. Does the fact that after commencement of suit Respondents come before the court and say that the order was merely "advisory" defeat such suit any more than if a law enforcement officer, when suit is brought against him to restrain the enforcement of a statute claimed to be unconstitutional, comes before the court and admits that the statute is unconstitutional? Does that admission defeat the suit and leave the plaintiff wholly without remedy against the threat of enforcement or does it in effect concede the right to relief? In legal effect, does it make any difference whether there is a threat to enforce a statute claimed to be constitutional or a threat to enforce a statute which is admitted to be unconstitutional? We see no difference, and there is none. The threat of enforce-

ment of a statute, whether claimed to be constitutional or admitted to be unconstitutional, is what invades the plaintiff's rights. To admit, as was done in the instant case after commencement of suit, that the Board's order was advisory only was to admit Petitioner's claim or right to relief, and we earnestly urge upon this court that Petitioner had the right to the entry of a judgment by the District Court declaring its right and relations with respect to such order, whether it be compulsory and invalid on account thereof or whether it be advisory only, and that Petitioner should not be dismissed out of court with a dismissal of the complaint with no protection whatsoever against the threatened unlawful actions of the Respondents.

Petitioner does not seek merely an advisory opinion of the court. It was faced with a very tangible and concrete situation. An actual order had been entered against it by the Board and its enforcement threatened to the point of the extinction of Petitioner's business. It sought protection against that order and against that enforcement, or at least it sought the declared judgment of the court as to its rights with respect to the order. If that is what is meant by an "advisory opinion" of the court then we cannot think of a single case which could be maintained under the Declaratory Judgments Act.

To say, as Respondents say, that the Board's orders under Executive Order 9017 "do not fix or alter the legal rights" of the parties is wholly inconsistent with the Board's position prior to the commencement of the suit with respect to its orders. Respondents should not now be permitted to take their present position where it is intended solely to defeat the suit and bring about a dismissal of Petitioner's complaint. Even though none of the Respondents have the legal right to themselves enforce

the Board's order, Petitioner's constitutional and other rights were impinged when the Board asserted that its order was compulsory and threatened to enforce the same, and moreover, when the Director of Economic Stabilization was directed to impose sanctions pursuant to Executive Order 9370, where there was no stated and clear distinction between orders entered prior to and subsequent to the enactment of the War Labor Disputes Act.

Technically an opinion is no part of the court's judgment.[6] When, therefore, the Board and the law officers of the Government, in the face of the characterization of the Board's orders by the court below as "advisory," still insist and announce their purpose to employ any and all administrative or executive action for the enforcement of such orders, it is plainly evident that they feel no restraint upon them by the views of the court below, but propose to be bound only by the judgment itself, which is to be one for the dismissal of the complaint. At times this court has held its hand in actually awarding relief by way of formal judgment where coordinate branches of the Government are concerned, or where lower court or state court judges are concerned—on the supposition, however, that such parties would conform to the views which this court had expressed. But this court has never,

6. In 33 C. J. at p. 1104, it is said: "* * * The reasons assigned by the court for the judgment entered do not constitute a part of the judgment. Therefore a judgment or decree of the court controls the written opinion, and if they are at variance, the former prevails and determines the rights of the parties." In respect of this last statement there are cited *Harriman* v. *Northern Security Co.*, 197 U. S. 244; *Abraham* v. *Casey*, 179 U. S. 210.

In 21 C. J. S., at p. 414, it is said that an opinion "cannot prevail against the final order or decision." See also *Stone* v. *United States*, 164 U. S. 380 at p. 383; *United States* v. *Shoshone Tribe*, 304 U. S. 111; *United States* v. *Wells*, 283 U. S. 102.

Unquestionably a court may look to an opinion of another court for certain purposes. But in the final analysis the judgment is controlling. Cf. *M. E. Blatt* v. *United States*, 305 U. S. 267. It must follow then as a matter of necessity that in case of conflict the judgment and not the opinion controls. We again point out, therefore, that the characterization by the court below of the Board's order as being advisory gives no protection to Petitioner against the judgment dismissing its complaint.

so far as we know, expressed views in favor of a litigant and then dismissed his suit. We could understand that out of a delicate regard for the Respondents the court below might have suggested that in view of its views as to the nature and extent of Board orders it felt assured that the Board and other parties concerned would conform thereto without the necessity of the entry of a formal order. We see no sense or justice, however, in doing what the court below has done in this case, namely, to direct a dismissal of Petitioner's complaint, although it apparently sustains Petitioner's position to the effect that the Board's order is not binding or compulsory upon it—even though the court's reasons for such holding are not the same as the reasons urged by the Petitioner.

B. The Suit Here Is Not in Effect One Against the United States.

We do not intend to indulge in any extended argument of this point. Apparently the court below does not regard the instant suit as being one against the United States—even though it directs, apparently without limitation, the granting of Respondents' motions to dismiss. Had the court below regarded the present suit as being against the United States in effect it would not have had jurisdiction to any extent beyond such holding, it would have no right or jurisdiction to determine anything as to the character of the orders of the War Labor Board.

II.

Petitioner Established a Claim Against Respondent Upon Which Relief May Be Granted.

A. Petitioner Stated a Claim Upon Which Injunctive Relief May Be Granted.

Respondents seem to contend that the complaint does not show that Petitioner has been, or will be, irreparably damaged by any action or threat of action by Respondents, and that Petitioner therefore is not entitled to relief in equity. Here again the contention is based upon the proposition that the order of the Board was merely advisory. We again point out that the Board's order was intended to and did, according to the Board's interpretation thereof at the time of the show cause hearing, fix the status of Petitioner's labor relations against its will; that the order remains a constant threat against Petitioner. That the Board made the threats and proceeded to act under them as alleged in the complaint is admitted by the motion to dismiss.[7]

The very assertion of the Board that it had the power of compulsory arbitration, and that its order amounted to a compulsory arbitration award, and that Petitioner would be compelled to comply therewith, is in itself a violation of Petitioner's constitutional rights. In the second *Wolff Packing Co.* v. *Court of Industrial Relations*, case, 267 U. S.

7. Not only would the Board compel Petitioner to accept a contract against its will in violation of Petitioner's constitutional rights (see note 5 *supra*), but it would impose upon Petitioner a standard clause for maintenance of membership which has no sanction of Congress. The Board avowedly grants such a provision to all unions. *Little Steel*, 1 W. L. R. 325; *Atlas Powder*, 5 W. L. R. 371; *Humble Oil & Rfg. Co.*, 15 W. L. R. 380. In so doing it, in effect, adopts or establishes a national policy. Only Congress may legislate.

In view of the decisions of this court in the *Wallace* and *Richwood* cases, No. 66-67, this term, ... U. S. ....., decided December 18, 1944, there would seem but little question that provisions for maintenance of membership and check-off are in violation of the National Labor Relations Act, entirely aside from the fact that they are forced upon the employer against his will.

552, this court assumed that compulsory arbitration contemplated compliance by any means.

Under the doctrine of the numerous cases heretofore cited, therefore, and particularly *Stark* v. *Wickard*, 321 U. S. 288, the Board may be enjoined from doing anything further to compel Petitioner to comply with its said order. It is not technically correct to say, as Respondents say, that the said order is not "self-enforcing." The order purported to be self-enforcing in that it purported to fix the rights of the parties. That the Board itself was not the "policeman on the beat" for purposes of enforcement is immaterial. It advises Petitioner that it proposes to do everything possible to bring about compliance.[8] Petitioner is not required to speculate how, or in what form, the Board's activities will appear, nor assume the hazard therof. The fact that the Board had a "compliance officer" certainly was not a meaningless gesture.

Nor is it sound law to say that an administrative body will not be enjoined from giving advice—not as applied to the circumstances here present. The Board was not giving advice to the President as to what they thought the President should do. Rather the Board was telling Petitioner what the Petitioner was required to do and would be made to do, and Petitioner was told that the Board would exhaust all means to bring about compliance. It is idle, therefore, to argue that merely because the Board might not itself seize a plant or impose a sanction that it is to remain free from the consequences of its own unlawful conduct.

So far as the Director of Economic Stabilization or the Board itself is concerned, it might be pointed out that while Executive Order 9370 is directed to the Director himself, the Board was authorized to consider and advise with the Director, and it is not a too violent assumption that in any

8. Compare what it attempted to do in the *Windsor* case. (J. A. 69-70.)

action under Executive Order 9370 the Director will advise with and act in concert with the Board. It is therefore wholly proper that when the Director himself is made a party to the suit the Board may also be made a party.

Furthermore, there would seem to be no question that under the authorities an action will lie against the Director if he is directed to or is about to proceed against the Petitioner pursuant to Executive Order 9370. Nothing in the record before the court makes it clear that the Director will not act at any time that suits his own convenience. The insufficiency of the Director's letter which was made a part of the Garrison affidavit, and the Garrison affidavit itself, has been mentioned above. We will have occasion to mention it again in a subsequent portion of this brief. Suffice it here to say that the Director has not effectively disclaimed any power to invoke the sanctions specified in Executive Order 9370 in a case like the instant case, nor, we may say, has the Director any power himself to limit the President's order. Whether he has or has not the power to proceed with respect to the Board's order of May 31, 1943 may be a legal question for the court ultimately to determine, in which event such determination should be incorporated into a declaratory judgment. Short of that no one but the President himself may limit or effectively construe his order.

B. Petitioner Has a Claim Upon Which Declaratory Relief May Be Granted.

The Declaratory Judgments Act explicitly provides that relief may be had by way of declaring the rights and legal relations of the plaintiff wholly irrespective of whether any other or further relief may or may not be had. In view of the controversy as to the effect of the Board's order and the necessity of Petitioner's complying therewith and

the possible consequences thereof, Petitioner had the right to ask the District Court to declare its rights and legal relations with respect to the order. If in fact or in law the controversy had not reached a point where a remedy by way of injunction was appropriate, the court nevertheless could still proceed to declare the rights of the parties. The decisions of this court, including specifically *Currin* v. *Wallace*, 306 U. S. 1, sustain that right. See also *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227.

We see no reason, if the order was advisory in the fullest literal sense indicated by the court below, why it was not appropriate, or why Petitioner did not have the right to have the court so declare by a *judgment* entered in the case. And we have shown that the opinion of the court below as to the effect of the order is no part of, and would not control as against a judgment dismissing the complaint. Certainly Petitioner is entitled to some protection against the enforcement of an order otherwise unenforcible—no matter what the ground may be for its being unenforcible, when its enforcement against Petitioner is being specifically threatened. To deny relief by way of declaratory judgment, as the court below in this case has done, is to destroy the purpose and efficacy of the Declaratory Judgments Act. We have already made mention of the fact that frequently a declaratory judgment has the same admonitory effect as an injunctional order. *Great Lakes Co.* v. *Huffman*, 319 U. S. 293. Petitioner respectfully insists that it is entitled to some protection from the court against the order in question.

It has already been said that Respondents urge that the validity of Executive Order 9017 as amounting to compulsory arbitration, and the constitutional power of the Board acting pursuant thereto, may not be inquired into because the President himself is not a party to this suit.

It is sufficient to say that wherever an administrative official seeks to justify under a Presidential or executive warrant or license, the validity of such warrant or license may be questioned in any appropriate action. The fact that the President himself is not a party to the proceeding is immaterial. *United States* v. *Lee,* 106 U. S. 196; *Ex parte Quirin,* 317 U. S. 1; *Hirabayashi* v. *U. S.,* 320 U. S. 81.

The complaint shows that the Board—in fact all Respondents—were acting pursuant to executive orders of the President, and that the Board's assertion of the compulsory effect of its order stemmed from the compulsory effect of Executive Order 9017. Necessarily, under such circumstances, if the Board seeks to justify the exercise of its claimed powers, the constitutional validity of the executive order itself is a proper subject of inquiry.

III.

Respondents Were Not Entitled to a Summary Judgment.

A motion for summary judgment may be granted only when it appears that there is no genuine issue of fact, and that the moving party is entitled to a judgment as a matter of law. (Rule 56.) No answer was ever filed by Respondents. Therefore there was no issue joined as to any of the allegations of the complaint. On the contrary the motion to dismiss admitted such allegations.

It is claimed that the Garrison affidavit shows that Executive Order 9370 does not apply to the Board's order here involved. To begin with, as appears from what we have said with respect to that affidavit in the accompanying petition for certiorari, the affidavit presents no evidentiary fact whatsoever, but is "conclusory" in form. The Vinson letter itself, at best, states a possible construc-

tion of Executive Order 9370, and the Garrison affidavit merely states as a conclusion that the Director of Economic Stabilization does not intend to act in the case of an order of the Board entered prior to the enactment of the War Labor Disputes Act. The opposing affidavits, however, showed that the Board itself was claiming that its powers were the same so far as the compulsory character of its orders were concerned before the enactment of the War Labor Disputes Act as they were subsequent to such act; that the Board's orders, even under Executive Order 9017, amounted to compulsory arbitration and employers were to be compelled to comply therewith.

There was not even a denial in any affidavit of the plain explicit allegation in the complaint that the Board had reported the matter to the President (J. A. 32) or that the Director of Economic Stabilization had or was about to impose sanctions (J. A. 32-33), or that the Director of Economic Stabilization and other governmental agencies were about to or had taken action to withhold or withdraw priorities, etc., from Petitioner. (J. A. 33.) Rule 56(e) requires affidavits offered in support of motions for summary judgment to set forth such facts "as would be admissible in evidence." Nothing in the Vinson letter or in the Garrison affidavit would be "admissible in evidence." In *Walling* v. *Fairmount Creamery Co.*, C. C. A. 8, 139 Fed. (2d) 318, the Eighth Circuit held that conclusory affidavits were insufficient. We do not see how Rule 56 would permit any other view.

It would seem, therefore, that the motion for summary judgment adds nothing to Respondents' motions to dismiss. And there again it is respectfully urged that the order of the District Court overruling said motion should have been affirmed by the court below—wholly irrespective of what that court thought of the character of the Board's order.

All Petitioner was seeking in the instant suit was a determination of the question whether the Board's order was binding upon it and whether Petitioner would be required to comply therewith. It sought a determination as to whether a system of compulsory arbitration pursuant to executive order was within the domain of the Constitution. Petitioner further sought a determination as to whether it could be required to include provisions in its labor contract—for maintenance of membership and check-off—which would compel it to violate the National Labor Relations Act. Notwithstanding the "lip service" which the Board and other administrative officials have given to the proposition that employers were entitled to have such questions passed upon by the courts, such officials, by urging the dismissal of the present litigation, seek to prevent any such determination.

We respectfully urge either that this court grant certiorari and determine the vastly important substantive questions involved and thereby save further delay, or else reverse the court below and send the case back to the District Court for a hearing upon the merits. Cf. *Utah Fuel Co. v. Bituminous Coal Commission*, 306 U. S. 56.

Respectfully submitted,

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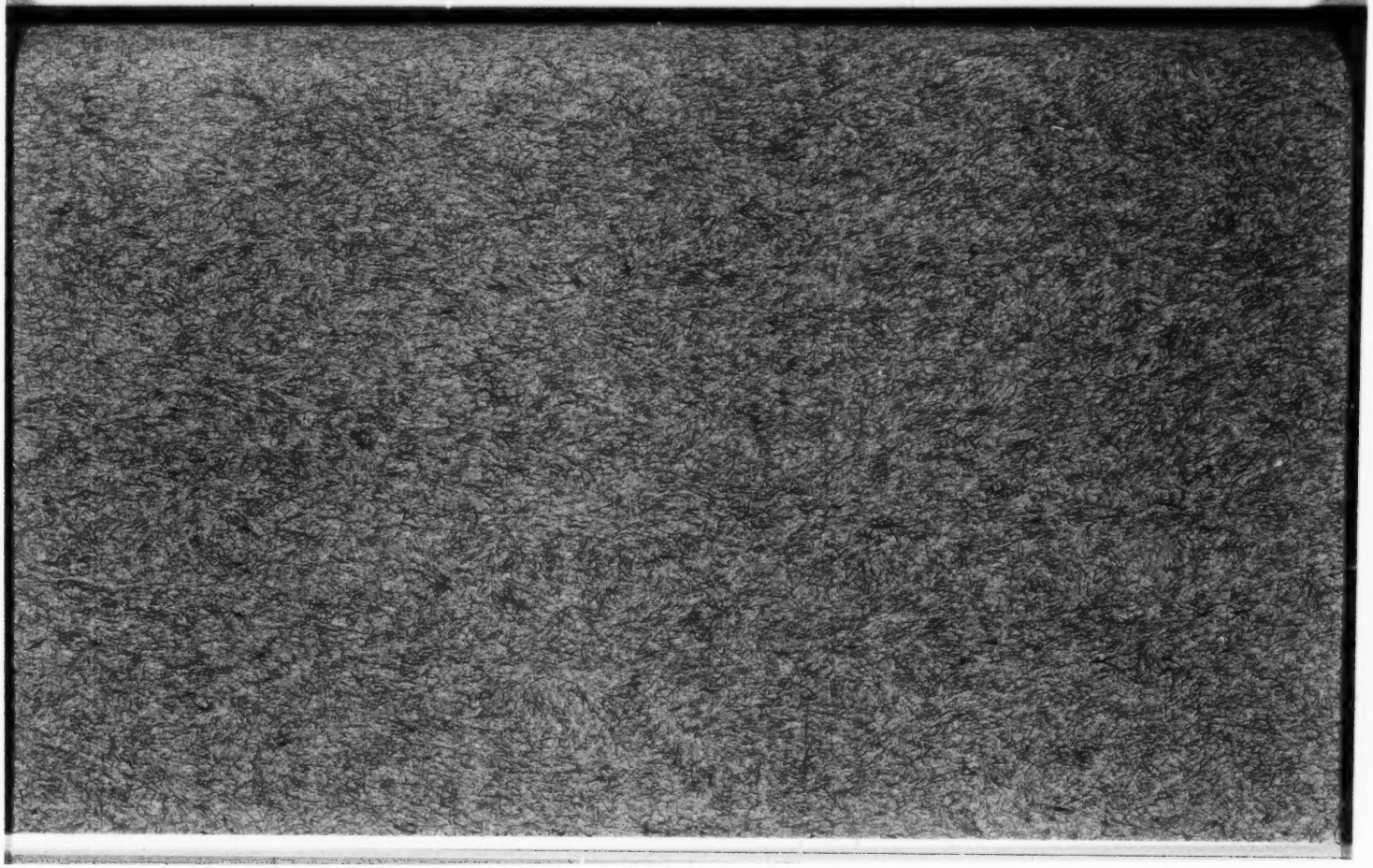

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 857

UNITED STATES GYPSUM COMPANY, PETITIONER

v.

NATIONAL WAR LABOR BOARD ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The District Court of the United States for the District of Columbia did not render an opinion. The opinion of the United States Circuit Court of Appeals for the District of Columbia (R. 98–99) is reported at 145 F. 2d 97.

JURISDICTION

The judgment of the Court of Appeals was entered on October 23, 1944 (R. 100). The petition for a writ of certiorari was filed on January 22, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The principal question presented is whether a "directive order" of the National War Labor Board, issued prior to the enactment of the War Labor Disputes Act and the promulgation of Executive Order No. 9370, may be enjoined or declared invalid and unenforceable in a proceeding brought in the Federal courts.

STATUTE AND REGULATIONS INVOLVED

The relevant portions of the statute and executive orders involved are set forth in the Appendix, pp. 14–18, *infra*.

STATEMENT

On September 23, 1943, the petitioner filed a complaint in the District Court of the United States for the District of Columbia seeking (1) to enjoin the respondents and "all other departments or agencies of the Government, whether named as defendants herein or not," from taking any action to enforce a directive order of the National War Labor Board issued on May 31, 1943, and (2) to obtain a declaratory judgment to the effect in substance that the order is void and that neither respondents nor the President has any power in relation to petitioner's non-compliance with the order (R. 34–39). The complaint named as defendants in their official capacities and individually the National War Labor Board, the Economic Stabilization Board, the chairmen and members of both Boards, and the Director of

Economic Stabilization (R. 2–3).[1] The President was not named as defendant and consequently is not a respondent herein.

The material allegations of the complaint may be summarized as follows: Petitioner operates a plant at Warren, Ohio, where it is principally engaged in the manufacture of metal stair treads, platforms, and other metal specialties for use in merchant and war ships, army tanks, and war plants (R. 7). In May 1942, at the expiration of a previous collective bargaining agreement, a dispute arose in the plant between petitioner and its employees concerning the terms and conditions of employment to be included in a new collective bargaining contract (R. 8). Upon failure of the parties to agree, the dispute was referred to the Conciliation Service of the United States Department of Labor, and thereafter, upon failure of conciliation attempts, it was certified by the Secretary of Labor to the National War Labor Board pursuant to the provisions of Executive Order 9017 (R. 9). A hearing was subsequently conducted before two mediation officers designated by the Board, and, upon the report and recommendations of these officers, the Board, on May 31, 1943, issued its directive order in the case which provided, *inter alia,* for a 5-cent per hour wage increase retroactive to July 20, 1942, and

[1] The Director of Economic Stabilization is also Chairman of the Economic Stabilization Board. The Board is advisory to the Director and possesses no independent powers.

the incorporation of maintenance of union membership and check-off clauses in a new contract (R. 9–15).

The complaint further alleges in substance that petitioner informed the Board that it rejected certain provisions of the directive order; that at a subsequent hearing before the Board on June 24, 1943, a member of the Board threatened to refer the matter to the President for action; that the matter has been referred to the President; that petitioner's noncompliance has been certified to the respondent Director of Economic Stabilization; and that the Director, pursuant to the provisions of Executive Order 9370, promulgated August 16, 1943, "is required," and that he, together with other departments of Government, "are about to or have taken action," to apply certain sanctions specified in Executive Order 9370 for the purpose of compelling petitioner to accede to the provisions of the directive order (R. 16–34). The complaint alleges further that enforcement of the directive order would violate petitioner's constitutional rights, that the order was adopted without due process of law, and that certain of its provisions are in conflict with the National Labor Relations Act and the provisions of the War Labor Disputes Act which was adopted subsequent to the issuance of the order (R. 15–34).

The respondents moved to dismiss the complaint or, in the alternative, for summary judg-

ment on the grounds that the court had no jurisdiction over the subject matter of the action and that the complaint failed to state a claim upon which relief could be granted (R. 46–48). In support of the motion, the respondents filed an affidavit (R. 46–48) by Lloyd K. Garrison (then General Counsel and Executive Director of the National War Labor Board) stating that the Director of Economic Stabilization had neither threatened nor taken action to compel compliance with the directive order; that the Director in a letter to the Board (R. 48) had disclaimed any authority to invoke sanctions under Executive Order 9370 because in his opinion his discretion and power to do so applied only to Board orders issued pursuant to the War Labor Disputes Act of June 25, 1943, c. 144, 57 Stat., 163, enacted approximately one month after issuance of the directive order here involved.

In opposition to the motion for summary judgment, the petitioner filed affidavits and a partial transcript of a hearing before a committee of Congress (R. 49–93). The transcript revealed that in an early and unrelated case the Board had attempted to secure compliance with a directive order through other agencies of the Government. The affidavits recited that in another unrelated case the Board had referred the matter of an employer's noncompliance with such an order to the President who had thereafter ordered the Army to seize the employer's plant, and that in a

third unrelated case of noncompliance, the employer's "officials were notified [the affidavit does not state by whom] that the military forces of the Government had received instructions to stand by awaiting further instructions with reference to the non-compliance."

The District Court denied the respondents' motion to dismiss or for summary judgment (R. 95). On special appeal allowed by the Court of Appeals (R. 95), the order of the District Court was reversed (R. 98–99) on the authority of *Employers Group of Motor Freight Carriers* v. *National War Labor Board,* 143 F. (2d) 145 (App. D. C.), certiorari denied October 9, 1944 (No. 350, this Term), and *National War Labor Board* v. *Montgomery Ward & Co.,* 144 F. (2d) 528 (App. D. C.), certiorari denied November 13, 1944 (No. 538, this Term), and the cause was remanded to the District Court for further proceedings not inconsistent with the court's opinion (R. 100).

ARGUMENT

Petitioner contends, notwithstanding the decisions in the *Employers Group* and *Montgomery Ward* cases, that it is entitled to injunctive relief against respondent or, in any event, to a declaratory judgment fixing the respective rights of the parties, and that the decision of the court below denying its right to either form of relief constitutes reversible error. In the *Employers Group* and *Montgomery Ward* cases it was held,

as is plain, that there is no statutory provision for judicial review of War Labor Board directive orders, and that the complaints in those cases failed to allege grounds entitling the plaintiffs either to injunctive relief or, in the *Montgomery Ward* case, to a declaratory judgment. We submit that there is nothing in the present case which justifies a departure from the sound rule there announced.

1. *Petitioner is not entitled to equitable relief.*

Since no power vested in the Board at the time of the issuance of its directive order herein [2] and no power has since been conferred upon it to compel compliance with its orders by legal proceedings or by the imposition of sanctions, the order in no way altered the legal rights of the parties. Despite this apparent lack of the requisite ground for judicial review of the Board's order (*United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299; *Pennsylvania R. R. Co.* v. *Labor Board*, 261 U. S. 72; *Pennsylvania Federation* v. *Pennsylvania R. R. Co.*, 267 U. S. 203; *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297; *Baltimore Transit Co.* v. *Flynn*, 50 F. Supp.

[2] As before stated, the directive order in question, like that involved in the *Employers Group* case, was issued prior to the passage of the War Labor Disputes Act. It may be noted that this fact substantially diminishes the practical importance of the question presented, since Board orders after the passage of the Act on June 25, 1943, have been issued pursuant thereto.

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382 (D. Md.); the *Employers Group* and *Montgomery Ward* cases, *supra*), the petitioner contends that respondents threaten to or are required to take steps to compel compliance with the directive order, and that an examination of the validity of the order is warranted under the general equity powers of the court. With respect to none of the respondents, however, is there adequate ground for such a contention.

(a) *With respect to the Director of Economic Stabilization.*

Petitioner alleges that this official "is required to" take action against it to compel compliance by directing the withdrawal of priorities, etc., under Executive Order 9370 (promulgated two and one-half months after the issuance of the Board's directive order) and alleges further, apparently on the basis of this legal conclusion as to the Director's duties, that the Director "will, and is about to" and that he and others "are about to or have taken" action against it (R. 32–33). Both the premise and the conclusion are erroneous. As is manifest from the terms of the Order and was stated by the court below in the *Montgomery Ward* case with respect to an identical contention regarding the mandatory nature of the Director's functions, "Executive Order 9370 neither requires nor authorizes the Director to issue any directives except such as he may deem necessary" (144 F. 2d at 531). The Director has expressly disclaimed that his discretionary

powers under the Executive Order extend to the enforcement of the present order, for the reason that it was issued prior to the enactment of the War Labor Disputes Act (R. 48). Consequently, as is affirmed in the Garrison affidavit (R. 46–47), the Director has neither taken nor threatened to take action to compel petitioner's compliance with the directive order.[3]

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[3] The disclaimer of the Director (R. 48) is itself sufficient to prevent issuance of the injunction sought. Petitioner's allegation that the Director "will," is "about to," or "has taken" action could at very most be viewed as an allegation of threatened injury. To render a public official suable in his personal capacity (the Director's immunity from suit as agent of the Government in his official capacity in the absence of statutory consent, here lacking, is well established: *Louisiana* v. *McAdoo*, 234 U. S. 627, 632; *Oregon* v. *Hitchcock*, 202 U. S. 60, 69; *Wells* v. *Roper*, 246 U. S. 335, 337), he must either be acting or threatening to act outside the scope of his authority or under an invalid law or order. *Ex parte Young*, 209 U. S. 123, 159. And to maintain injunctive proceedings on the ground of threatened action, there must be a present intent or readiness affirmatively expressed to proceed under the allegedly invalid statute or order. *Watson* v. *Buck*, 313 U. S. 387, 400; *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 49; *Gibbs* v. *Buck*, 307 U. S. 66, 77–78; *Ex parte La Prade*, 289 U. S. 444, 458. Consequently, petitioner's contention (Pet. 35–36; Br. 23, 41) that the Garrison affidavit is insufficient because "conclusory" is footless.

The Director's press release of February 15, 1945, defining the occasions upon which sanctions authorized by Executive Order No. 9370 may be employed to enforce orders of the National War Labor Board, was issued in connection with the use of such sanctions to secure compliance with a directive order dated November 9, 1944, in *E. A. Laboratories, Inc.*, Case No. 111–11443–D. The War Labor Disputes Act was enacted June 25, 1943.

(b) *With respect to the War Labor Board.*

The Board has not claimed any power of enforcement with respect to its directive order. It affirmatively appears that at the hearing held June 24, 1943, to which petitioner adverts, petitioner was informed that the Board lacked enforcement powers of its own (R. 20). Petitioner was there informed that if it remained in noncompliance "the Board will refer this matter to the President for such action as he deems appropriate" (R. 23). The complaint alleges that this step has been taken, and the short answer to petitioner's prayer for injunctive relief against the Board is that there is nothing further the Board can do or is threatening to do.

Plainly, upon these facts, petitioner is in no better position than were the plaintiffs in the *Employers Group* and *Montgomery Ward* cases, in which this Court denied review of the decision of the Court of Appeals granting motions identical with that made by respondents. As stated in the latter decision (144 F. 2d at 530):

> A plaintiff cannot confer jurisdiction to review even commonplace administrative action by a mere forecast that he will be irreparably injured if the court does not intervene. He must allege facts which support his forecast. The plaintiff has not done so.

As noted in the decision of the court below, this case differs from *Employers Group, etc.* v. *Board*

chiefly in that the complaint here alleges that the Board has reported the fact of noncompliance to the Director of Economic Stabilization, who disclaims any power to act in respect thereto, *supra*, p. 9, and to the President, whereas the earlier complaint in effect alleged that the Board might make such reports. The alleged report to the President is "informatory and at most, advisory" and not subject to judicial review. *Employers Group, etc.* v. *Board*, 143 F. 2d 145, 151; *United States* v. *Bush & Co.*, 310 U. S. 371, 379; *Standard Computing Scale Co., Ltd.* v. *Farrell*, 249 U. S. 571, 574; *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810, 814 (C. C. A. 2); *Baltimore Transit Co.* v. *Flynn*, 50 F. Supp. 382 (D. Md.). And whether the President, who is not a party here, would take further action is entirely conjectural and would depend upon an independent determination to be made by him.[4] The alleged fact that the Board has reported the matter to the President does not establish any independent ground for judicial review. As succinctly stated by the court below (R. 99):

> The *Employers Group* case decided that the Board's order was not enforceable and

[4] If the President should order possession to be taken by the United States of the petitioner's plant, such action would be taken to prevent a break-down of operations deemed essential in the interests of the war effort. The petitioner's fear of a possible exercise by the President of his seizure powers would thus not be removed even if the order were enjoined or declared invalid.

> therefore not reviewable; that any reports which the Board might make would be merely advisory; and that the correctness of administrative advice cannot be reviewed by the courts. Such advice is no more subject to review after it has been given than before.

The Board's order "does not of itself adversely affect complainant" (cf. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 130), contains none of the incidents requisite for judicial review (see cases *supra,* p. 8), and affords no basis for injunctive relief.

2. *Petitioner is not entitled to a declaratory judgment.*

As in the *Montgomery Ward* case, petitioner seeks to obtain a declaratory judgment as to the validity of the Board's order. We have already shown that petitioner is not entitled to equitable relief. By the same token the petitioner is not entitled to declaratory relief. There is here presented no "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" (*Maryland Casualty Co.* v. *Pacific Co.,* 312 U. S. 270, 273). *Helco Products Co.* v. *McNutt,* 137 F. 2d) 681 (App. D. C.); *Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 443; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324–325; *Smith* v. *American Asiatic Underwriters, Federal,* 127 F.

2d 754, 756–757 (C. C. A. 9). The Declaratory Judgment Act does not open the federal courts to those who seek "to obtain an advisory decree" upon "hypothetical controversies which may never become real." *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 443. *Coffman* v. *Breeze Corporations, Inc.*, No. 71, this Term, decided January 2, 1945.

CONCLUSION

The practical significance of the question presented is sharply diminished by reason of the enactment of the War Labor Disputes Act within the month following issuance of the Board's directive order, and the case falls within the principle of the *Employers Group* and *Montgomery Ward* cases, in which this Court denied further review. The decision below is correct and no conflict of authority is presented. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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FEBRUARY 1945.

APPENDIX

I

Statute Involved

The War Labor Disputes Act (57 Stat. 163, 50 U. S. C. App. (Supp. III) 1501) provides, in part, as follows:

> Sec. 7. (a) The National War Labor Board (hereinafter in this section called the "Board"), established by Executive Order Numbered 9017, dated January 12, 1942, in addition to all powers conferred on it by section 1 (a) of the Emergency Price Control Act of 1942, and by any Executive order or regulation issued under the provisions of the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes", and by any other statute, shall have the following powers and duties:
>
> (1) Whenever the United States Conciliation Service (hereinafter called the "Conciliation Service") certifies that a labor dispute exists which may lead to substantial interference with the war effort, and cannot be settled by collective bargaining or conciliation, to summon both parties to such dispute before it and conduct a public hearing on the merits of the dispute. If in the opinion of the Board a labor dispute has become so serious that it may lead to substantial interference with the war

effort, the Board may take such action on its own motion. At such hearing both parties shall be given full notice and opportunity to be heard, but the failure of either party to appear shall not deprive the Board of jurisdiction to proceed to a hearing and order.

(2) To decide the dispute, and provide by order the wages and hours and all other terms and conditions (customarily included in collective-bargaining agreements) governing the relations between the parties, which shall be in effect until further order of the Board. In making any such decision the Board shall conform to the provisions of the Fair Labor Standards Act of 1938, as amended; the National Labor Relations Act; the Emergency Price Control Act of 1942, as amended; and the Act of October 2, 1942, as amended, and all other applicable provisions of law; and where no other law is applicable the order of the Board shall provide for terms and conditions to govern relations between the parties which shall be fair and equitable to employer and employee under all the circumstances of the case.

* * * * *

II

Regulations Involved

1. Executive Order No. 9017 (January 12, 1942; 7 F. R. 237) reads, in part, as follows:

> Whereas by reason of the state of war declared to exist by joint resolutions of the Congress, approved December 8, 1941 and December 11, 1941, respectively (Public Laws Nos. 328, 331, 332, 77th Congress), the

national interest demands that there shall be no interruption of any work which contributes to the effective prosecution of the war; and

WHEREAS as a result of a conference of representatives of labor and industry which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for the peaceful adjustment of such disputes;

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and the statutes of the United States, it is hereby ordered:

1. There is hereby created in the Office for Emergency Management a National War Labor Board, hereinafter referred to as the Board. The Board shall be composed of twelve special commissioners to be appointed by the President. Four of the members shall be representative of the public; four shall be representative of employees; and four shall be representative of employers. The President shall designate the Chairman and Vice-Chairman of the Board from the members representing the public. The President shall appoint four alternate members representative of employees and four representative of employers, to serve as Board members in the absence of regular members representative of their respective groups. Six members or alternate members of the Board, including not less than two members from each of the groups represented on the Board, shall constitute a quorum. A vacancy in the

Board shall not impair the right of the remaining members to exercise all the powers of the Board.

* * * * *

3. The procedures for adjusting and settling labor disputes which might interrupt work which contributes to the effective prosecution of the war shall be as follows: (a) The parties shall first resort to direct negotiations or to the procedures provided in a collective bargaining agreement. (b) If not settled in this manner, the Commissioners of Conciliation of the Department of Labor shall be notified if they have not already intervened in the dispute. (c) If not promptly settled by conciliation, the Secretary of Labor shall certify the dispute to the Board, provided, however, that the Board in its discretion after consultation with the Secretary may take jurisdiction of the dispute on its own motion. After it takes jurisdiction, the Board shall finally determine the dispute, and for this purpose may use mediation, voluntary arbitration, or arbitration under rules established by the Board.

2. Executive Order No. 9370 (August 16, 1943; 8 F. R. 11463) reads, in part, as follows:

AUTHORIZING THE ECONOMIC STABILIZATION DIRECTOR TO TAKE CERTAIN ACTION IN CONNECTION WITH THE ENFORCEMENT OF DIRECTIVES OF THE NATIONAL WAR LABOR BOARD

By virtue of the authority vested in me by the Constitution and the statutes of the United States, it is hereby ordered:

In order to effectuate compliance with directive orders of the National War

Labor Board in cases in which the Board reports to the Director of Economic Stabilization that its orders have not been complied with, the Director is authorized and directed, in furtherance of the effective prosecution of the war, to issue such directives as he may deem necessary:

(a) To other departments or agencies of the Government directing the taking of appropriate action relating to withholding or withdrawing from a non-complying employer any priorities, benefits or privileges extended, or contracts entered into, by executive action of the Government, until the National War Labor Board has reported that compliance has been effectuated;

* * * * *

(c) To the War Manpower Commission, in the case of non-complying individuals, directing the entry of appropriate orders relating to the modification or cancellation of draft deferments or employment privileges, or both.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 857

UNITED STATES GYPSUM COMPANY, A CORPORATION,
Petitioner,

vs.

NATIONAL WAR LABOR BOARD, ET AL.,
Respondents.

REPLY BRIEF ON BEHALF OF PETITIONER HEREIN IN SUPPORT OF PETITIONER'S PETITION FOR CERTIORARI.

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MAY IT PLEASE THE COURT:

Notwithstanding Respondents' statement of the case in their answer to the petition for certiorari herein, we refer the court to the more detailed statement of the case as set out in the petition for certiorari at pages 2-15, and in the supporting brief at pages 2-13. Specifically, with respect to the Garrison affidavit and what Respondents consider to be a "disclaimer" by Mr. Vinson (Respondents' Br., pp. 5, 10-11), we ask the court to consider what was said with respect to those matters in the petition for certiorari commencing at pages 10-11 and at page 35, and in the supporting brief under Point III commencing on page 43 thereof.

The question raised by the Garrison affidavit and the Vinson letter are included among the questions presented by the petition for certiorari. (pp. 16-17.)

Respondents assert the so-called "advisory" character of the Board's order as held by the court below as if that holding were a final and complete determination of the controversy. Although such is not the case, as appears we believe from the petition for certiorari herein and the brief in support thereof, we are met once again by the all-important question as to just what the Government's real contentions are with respect to the character and enforcibility of Board orders. Respondents in their brief in no way deal with the questions involved from the standpoint of the claim that Board orders are enforcible by administrative action.

In its brief herein Respondents assert that Petitioner is not entitled to equitable relief for the reason that the Board itself has, and had, no power to compel compliance either by legal proceedings or the imposition of sanctions, and that therefore "the order in no way altered the legal rights of the parties." (Respondents' Br., p. 7.) However, it does not at all follow from the fact that the Board itself has no powers of enforcement either through legal proceedings or by the imposition of sanctions that the order itself does not alter the legal rights of the parties. If the order is what the Board has consistently claimed it to be, namely "compulsory arbitration," then it does fix or alter the legal rights of the parties. By the terms of the order, mandatory in form, the Board required certain specific provisions—for maintenance of membership and check-off—to be included in Petitioner's contract with its employees, and the Board further directed a retroactive wage increase. The order in these respects certainly did fix or alter the legal rights of the parties, and the mere fact that Petitioner chose to comply with that part of the order

directing the retroactive wage increase does not in any way change the character or mandatory effect of the order.

Likewise in its petition for certiorari which has now been filed in this court in the *Ward* case the Government characterizes the decisions of the court below in the first *Ward* case and in the *Motor Carriers* case as merely that "The Board has no power to enforce its orders." (Petition, p. 20.) It is a mere quibble to argue that the *Board* has no powers of enforcement. That is not the question. Are or are not the Board's orders enforcible by any means, administrative or otherwise? To leave Petitioner without even the protection of a declaratory judgment declaring the unenforcibility of the Board's order is to give the Government a free hand to enforce the Board's order here involved against Petitioner in any manner or by any means deemed desirable by the Government.

In Petitioner's supporting brief (p. 25, *et seq.*) we called the court's attention to the fact that in the *Motor Carriers* case the court below stressed the absence of any threatened, or asserted right to maintain, administrative proceedings upon the authority of the Board's order, and in the *Ward* case stressed the absence of any specific showing of threats of enforcement, whereas in the instant case specific threats of enforcement were made by the Board and are included in the record of this case before the Board, and it is now clear that the Board and the executive branch of the Government assert, and insist upon, the enforcibility of the Board orders by administrative proceedings. As stated in our petition for certiorari (p. 16), "What is the essential nature of the Board's orders? Can they be merely 'advisory' and at the same time enforcible by executive action? Or, if the order here is enforcible in any way or by any means, was not Petitioner entitled to a judicial determination by the District Court as to whether the order violated its constitutional right, or required it to

enter into a contract specifically in violation of the National Labor Relations Act? Is not the order under such circumstances reviewable?" In the old *Pennsylvania Railroad* cases[1] the orders were specifically held to be incapable of enforcement excepting through the persuasive effect of public opinion. And although such is said [presumably] to be the character of the order involved in the instant case [and of Board orders generally] by the court below in the *Motor Carriers* case, the *Ward* case, and in the instant case, and is clearly said by Judge Coleman in *Baltimore Transit Co.* v. *Flynn*, U. S. D. C. D. Md., 50 Fed. Supp. 382, the fact remains, as appears beyond any question of doubt, that such is not the character of the Board orders in the eyes of Respondents or of the executive branch of the Government at large.

In our petition for certiorari we called the court's attention to Executive Order 9370 directing Mr. Vinson, as Director of Economic Stabilization, to impose sanctions for non-compliance with an order of the Board, and we called the court's attention to the allegations in the complaint that Mr. Vinson had imposed, or was about to impose, such sanctions. To meet that phase of the case, Respondents produced the Garrison affidavit, which, as pointed out in the petition for certiorari and brief, was wholly inadequate to show the inapplicability of that order to Petitioner.

Since the filing of our petition for certiorari, and on February 14th last, Mr. Vinson has directed the imposition of sanctions against the E. A. Laboratories, Inc. (referred to in footnote 3 in Respondents' brief commencing at the bottom of page 10 thereof) because of the failure of that company to comply with an order of the Board. And sanctions were imposed for the avowed purpose of bringing about compliance with the Board's order. And that there may be no question as to the Government's

1. 261 U. S. 72; 267 U. S. 203.

view that Board orders are enforcible by executive action, as is clearly shown by Mr. Vinson's said directive, we include in the appendix hereto a copy of the release with respect to such directives. The directives of Mr. Vinson in the *E. A.* case leave no uncertainty of his position or of the position of the Government, that Board orders are in fact and law enforcible, and that the Government proposes to enforce them—if not by plant seizure under the supposed authority of the War Labor Disputes Act, or independently thereof, under the President's asserted constitutional powers.[1]

1. Reference by Mr. Vinson to the asserted principle that no one has a legal right to a government contract and that no employer who "defies" the Government's machinery for the settlement of disputes can claim such a legal right is a mere smoke screen to conceal the Government's essential position that Board orders are compulsory and enforcible. In *L. P. Steuart & Bro.* v. *Bowles*, 322 U. S. 398, this court sustained the right of OPA to suspend a fuel oil dealer for violating a ration order. But there not only was the suspension referable to the ration order itself, but the ration order itself was binding upon the dealer. For present purposes it may be conceded that if an executive regulation is in and of itself binding then the administrative agency in question may provide reasonable rules and regulations for enforcement. But even so, nothing in the *Steuart* decision supports the asserted right of the executive branch of the government to not only institute a system of "compulsory arbitration," but to enforce compliance with "compulsory arbitration awards" by executive action while at the same time denying to the citizen any right or recourse to the courts. If it be assumed that Executive Order No. 9370 applies only to orders of the Board issued pursuant to the War Labor Disputes Act, then we would have a case where the executive branch imposes a penalty for noncompliance with the Board's order in the absence of any legislative sanction therefor. In the *Steuart* case this court said:

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and administrative functions to make additions to those which Congress has placed behind a statute."

It might as well be claimed that if the Board saw fit to direct an employer to grant a three hundred per cent wage increase to his employees the President could thereupon seize the plant to compel compliance by the employer with the Board's order, or to cause sanctions to be imposed pursuant to Executive Order No. 9370

In the Government's opening brief filed before Judge Sullivan in Chicago in the *Ward* case it is insisted that Board orders were compulsory upon the employer and were to be enforced by Executive action. This was clearly the import of the affidavits of Judge Byrnes, Mr. Vinson, and Mr. Davis, Chairman of the Board. Specifically the

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because of such noncompliance. If compulsory arbitration is to be had either in peace or war time it is for the Congress, in the exercise of the legislative function, so to provide. And it would then be for Congress to provide means of enforcement and to provide penalties for noncompliance with the arbitration award. And certainly whether Congress did or did not so provide our constitutional form of government would not permit the enforcement of such award against the citizen without affording to the citizen his day in court.

Also, in passing, the further statement at the conclusion of the release that a "better method" [in addition to executive action for enforcement of Board orders] would be a Congressional act providing penalties enforcible by the judiciary for noncompliance with Board orders [advocated by Judge Byrnes a few days before] is tragic humor if we bear in mind that the Board itself successfully opposed including in the War Labor Disputes Act any provision for judicial enforcement. See Mr. Davis' statement to the Select Committee of the House investigating the Ward seizure (Report, pp. 36-39; and Mr. Biddle's statement (Rep. p. 142); see also the Majority Report of the opinion, pp. 12-13, 16.)

In the same connection a majority of the Committee made this statement:

> "Undoubtedly in the consideration of this legislation Congress had in mind the cooperation given the work by the Board by both industry and labor, despite the displeasure of each with some of its decisions, and that enforcement of its orders by any means whatever had been necessary in strikingly few instances, in each of which the Chief Executive had upon review made the war labor policy effective by Executive order and seizure. Our conclusion under these circumstances is that having eliminated the only alternative by painstakingly striking from the act all language that might be construed as authorizing enforcement through the courts, Congress intended that the orders of the Board should continue to be enforced when necessary in exactly the same manner as before. This method, already well established by usage, is neither prohibited nor limited and no other is suggested by the act."

See also what is said *infra* with respect to the Government's brief before Judge Sullivan in the *Ward* case.

brief quoted from the majority report of the Select Committee of the House, to the proceedings before which Committee we referred in our petition herein, and adopted the majority opinion as expressed in the Committee report as follows (p. 22):

> "Enforcement was considered and all language that might have been construed to authorize enforcement *through the courts* was with care stricken from the Act. But *no word of limitation* upon the use of Executive power was inserted, and no other means of enforcement was provided. Unless this legislation is to be held senseless and useless the inevitable conclusion is *that Congress contemplated and intended the orders of the Board to be enforced after passage of the Act in the same manner and by the exercise of the same authority as had repeatedly been done before the Act was passed.*" (Italics ours.)

The brief then attempted to reconcile the Committee holding with the decisions of the court below in the *Motor Carriers* case and the *Ward* case, and stated that the—

> "courts that have held that the orders of the Board cannot be enforced or reviewed in the courts have nevertheless recognized that as a result of a failure to settle a labor dispute on the basis of the Board's orders it may be necessary for the President to take possession of the plants and facilities involved in a labor dispute."[1]

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1. The Government's reply brief before Judge Sullivan in the *Ward* case contains, on page 27 thereof, this heading:

> "A. The Executive Order is not an attempt to enforce the orders of the War Labor Board, and a judgment for the plaintiff in this case will not require Ward to comply with those orders."

Under this heading we then find the following statements:

> "Neither the Executive Order nor this litigation is an attempt to enforce the orders of the War Labor Board against Ward as defendants contend. The Executive Order was issued because disputes between Ward and its employees that had lasted for two and a half years culminated in December, 1944 in a strike in the Ward plants in Detroit. * * *
>
> "The failure to comply with the order of the War Labor

Under the circumstances, and in view of the impelling necessity of a correct understanding as to the question of the enforcibility of Board orders—so far as that understanding can be had—we are constrained to call the court's attention to certain additional statements made by Mr. Biddle before the House Committee. These statements are in addition to those set forth in our petition for certiorari at pages 11-12; 25-28.[1]

The Committee report shows the following testimony:

"Mr. Biddle: * * * Let me put it this way: Practically speaking, the President enforces the order of the War Labor Board. * * *

"Mr. Clark: I meant a little more than that. I am raising the question as to whether Congress could possibly have intended to set up this Board with this great personnel, great consumption of time, and handle, as I understand, 6,700 cases, without having

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Board was one of the causes that led to these labor disputes. * * *

"*The fact is that neither the Executive Order nor a judgment for the plaintiff in this suit will compel Ward to obey the orders of the War Labor Board. Ward will not have to make a contract with the union. Ward will not have to accept maintenance of membership or arbitration or the other provisions contained in the Board's order. Ward will not have to pay the wages specified in the orders.* * * *This is a very different situation from the one that would exist if Ward could be compelled to obey or to comply with the orders of the War Labor Board. Ward could then be required to make the contract in its own name to perform under the contract, to pay the wages called for by the contract, and for doing these things it would receive no fair compensation from the Government.*" (Italics ours.)

It is difficult to reconcile the above statements with what Mr. Biddle testified to before the House Committee, which statements would seem to be a declaration that Board orders are unenforcible and need not as a matter of law be complied with by the employer.

1. The testimony there given and the report itself may properly be considered. Cf. *Muschany* v. *United States; Andrews, et al.*, v. *United States*, Nos. 31-32 this term, decided February 5, 1945. The Government's petition for certiorari in the *Ward* case refers to the same matters. (p. 25.)

intended that in some way or by some right this ultimate order should be enforceable.

"Mr. Biddle: I agree with you. It could not have intended that.

"Mr. Clark: Now, if it is conceivable that Congress deliberately took the enforcement of these orders out of the hands of the courts, then what other possible way is there for their enforcement, other than the Chief Executive?

"Mr. Biddle: There is none. Now, let me add, Mr. Clark, that although the War Labor Board's orders cannot be reviewed by the court, as I said, repeatedly, the seizure by the President can always be reviewed by the court.

"Mr. Clark: Now, getting right down to that, this proposition that if it is true that the courts cannot enforce these orders—I think that was clearly indicated—you cannot go into court on one of these orders, the employer, the employee, or the President, it cannot be litigated, if that is true then they cannot be enforced, unless they are enforced by the President.

"Mr. Biddle: Yes.

"Mr. Clark: And if enforced by the President, how could he proceed otherwise than he did proceed in this case? Is there any other way he could proceed than by seizure?

"Mr. Biddle: There is no other way. Moreover the statute says 'shall immediately seize.' (Report, p. 143.)

And further (Report, p. 144):

"Mr. Clark. Now, of course, when the Labor Board took up this case it entered an order on the 18th of January 1944, in which, as you have already suggested, it provided for maintaining the status quo, it provided for elections in 30 days, and so forth, which, as the record shows, Montgomery Ward declined to comply with. Now, if it be conceded that it thereupon became the duty of the Chief Executive to do something about it, you would say he had on recourse to the courts and he could not do anything but go out and seize the property."

"Mr. Biddle: No; I do not say that. I would like to have my statements recorded as accurately as possible.

"Mr. Clark: I did not intend to put anything in your mouth, Mr. Biddle.

"Mr. Biddle: I said his duty under the statute was to seize the property. That is what he was told to do by the statute. Now, the question was whether or not a court of equity would have given the Government adequate relief to get possession of the property. I said there were two things involved. First, I said it was his duty, under the whole structure of the act, not to go into the court but to seize the property; and, secondly, I said that until there was a real interference a court of equity would hardly see any reason to help the Government, with all its power to take and its direction under the statute to take. The court would say, 'Well, why don't you go in and take it? Why do you need us?'

"Mr. Clark: The point I was discussing here, I was laying the provisions of section 3 aside and I was referring to section 7, in which there is no direction to seize.

"Mr. Biddle: Under section 7 the Government could not have asked a court of equity to do anything. That is clear.

"Mr. Clark: Now, then, that order, or any order of the Board that is contested, there is no governmental agency or power to enforce it other than the power you possess through the President.

"Mr. Biddle: That is right.

"Mr. Clark: And he, under the provisions of section 7, could not go into court to effect that enforcement?

"Mr. Biddle: No.

"Mr. Clark: The only thing he could do was to take physical possession of the property.

"Mr. Biddle: That is right."

And further (Report, pp. 150-151):

"Mr. Dewey [reading]: * * *

"Now my question is: Are you the policeman? Are you the cop?

"Mr. Biddle: No, I am not a cop; I am just a lawyer.

"Mr. Dewey: But apparently there is the search for a cop. If a cop is not in the Attorney General's office, then where do you think he might be? Who is the cop?

"Mr. Biddle: That depends on the particular case.

"You mean who enforces these seizures?

"Mr. Dewey: I am very much in the dark in this regard myself, but Mr. Davis claims to have no authority and wants a cop. Who is the cop?

"Mr. Biddle: Well it is very clear to me who enforces them. If by the word 'cop' you mean what person has the Congress chosen to enforce these orders, it is the President, as you have said. So it is clear to me that the President is the man who enforces the orders."

And further:

"Mr. Biddle: I think there was every evidence that that might occur because, as I have said, it is the risk. You cannot guarantee the result, but as a matter of judgment when you see this thing spreading which goes to the roots of the no-strike, no-lockout agreement, it goes to the very roots of that, and if you say to labor throughout the country 'we will not enforce the decision of the arbitration machinery that both sides agree on' the risk is very great.

"Mr. Elston: Then you seized the plant in order to avoid this disaster?

"Mr. Biddle: Yes." (Report, p. 155.)

And further:

"Mr. Elston: What else did you accomplish?

"Mr. Biddle: We accomplished the thing that was basic in the whole situation, that the Government would enforce this agreement for no-strike and no-lockout. That is the essence of this thing." (Report, p. 156.)

And further:

> "Mr. Biddle: * * * We do not go into possession just for fun, we go in to enforce the order." (Report, p. 156.)

And further:

> "Mr. Elston: Then what is the purpose of the company and the labor organization entering into any agreement if the War Labor Board has that power to make any kind of an agreement that they want?
>
> "Mr. Biddle: They did not make the agreement. The only time when the War Labor Board enters into it is when there is a dispute. The question is, Mr. Elston, do you want a peaceable arbitration or don't you? The War Labor Board is given the power to arbitrate during the war. That is what it amounts to. It is given the arbitration procedure specifically under the Act. If you do not think there should be peaceable arbitration then don't put it in the Act." (Report, p. 160.)

Mr. Biddle advised the legality of Executive Order 9370. (Report, p. 163.) He therefore approved the position of the President when the latter said in his letter to Mr. Davis with reference to the War Labor Disputes Act that—

> "Congress intentionally left the enforcement of these [Board] orders to executive action." (J. A. 30.)

And further when the President said in the same letter,

> "When an employer refuses to comply his plant may be seized and operated by the Government in accordance with the terms and conditions of employment prescribed by the Board,"

and that—

> "Less drastic sanctions, however, including control of war contracts of essential materials and of transportation and fuel should be applied if this can be done without impeding the war effort,"

and that—

> "I am accordingly requesting the Director of Eco-

> nomic Stabilization to direct the application of any or all available sanctions of this sort by the appropriate agencies of government in cases of noncompliance reported to him by the Board." (J. A. 30.)

That Mr. Vinson is of the same mind clearly appears from his action in the E. A. Laboratories matter. In his letters to the Army and Navy he specifically stated (Appendix, p. 23):

> "Therefore, pursuant to Executive Order 9370 I hereby direct the Navy Department-War Department, unless the National War Labor Board shall report to it on or before February 10, 1945 that this employer is in compliance with the Board's directive order, to cancel, or cause to be cancelled, all contracts of this employer as rapidly as possible."

And in his letter to the War Production Board Mr. Vinson said:

> "Therefore, pursuant to Executive Order No. 9370, I hereby direct the War Production Board, unless the National War Labor Board shall report to it on or before February 10, 1945, that this employer is in compliance with the Board's directive order, to deny this employer all applications for priority assistance or for the allocation of materials which are in short supply, and to cancel all outstanding priorities and allocations."

And in the same release Mr. Vinson said (Appendix, p. 24):

> "In Executive Order No. 9370 the President has determined that the allocation of critical materials or facilities to those who refuse to abide by the legally authorized determinations of the National War Labor Board is not necessary or appropriate in the public interest and to promote the national defense."

In view of this specific act on the part of Mr. Vinson pursuant to Executive Order No. 9370 we urge again the necessity of a determination by this court as to whether

or not that executive order applies merely to orders of the Board entered after the enactment of the War Labor Disputes Act, or whether it applies to all orders of the Board, and of determining whether or not the Garrison affidavit or the Vinson letter, or both together, present any substantial ground for denying protective relief to Petitioner from the now plainly threatened action of Mr. Vinson against Petitioner because of Petitioner's refusal to abide by the Board's order.

In view of Mr. Vinson's action in the *E. A. Laboratories* case,[1] what becomes of the statement of the court below in

[1] The chronology in the *E. A. Laboratories* case is as follows:

The Board's order was entered under date of November 9, 1944. (Release B-1830.) Apparently a dissenting opinion of the industry members was filed at the same time. (Release B-1830A.)

The majority thereupon filed a majority opinion on January 23, 1945. (Release B-1830A.) However, the majority opinion itself is dated January 20, 1945.

Under date of January 31, 1945 Mr. Vinson sent his letters to the War and Navy Departments and to WPB. (Appendix, p. ....)

As stated, the letters directed action unless compliance by the company was reported on or before February 10, 1945. (Appendix, p. 23.)

Public notice of Mr. Vinson's action was not given until February 15, 1945. (Appendix, p. 21.)

It does not appear whether the company itself was ever given notice of the proposed imposition of sanctions.

In the first *Ward* case (No. 537, this term) it appears from the record therein (p. 86) that Mr. Vinson stated in his affidavit that he had neither threatened to take action, nor had taken action, to effectuate compliance with the Board's order, and that he was "not presently advised" as to what action, if any, he would take pursuant to his discretion under Executive Order 9370 "should the matter ever be reported to me." In the same case it appeared (Record, p. 87) that Mr. Garrison's affidavit stated that the Board had neither threatened to take action nor taken action to enforce its Directive Order, and that it "has not referred" the matter of the company's noncompliance with the Directive Order either to the President or to the Director of Economic Stabilization.

The release in the *E. A. Laboratories* matter stated that the Board had reported to Mr. Vinson the company's refusal to comply with the Board's order. (Appendix, p. 21.) It does not appear when the Board so reported, or whether the company had been given prior notice of the Board's intention to report the matter to Mr. Vinson.

the instant case that the alleged action taken, or about to be taken, by the Director is a mere "prediction" without legal effect? (J. A. 99.) As was pointed out in our supporting brief, (p. 32) the "threat" may be implicit in the statute or order itself. Here the threat by the Director of Economic Stabilization is implicit in Executive Order No. 9370. If the court below is right, then there could be no preventive relief until the threatened action becomes an accomplished fact. But in that event if there could be no injunctional or preventive relief until after the Director of Economic Stabilization has acted, then when he does act we would undoubtedly be met by the objection which has already been met in the instant case with reference to the Board, namely, that having reported the matter to the President there was nothing further for it to do, and therefore preventive relief cannot be had. (See Respondents' Brief herein, p. 10). In other words, Respondents claim that injunctional or preventive relief cannot be had prior to action actually taken by the Director of Economic Stabilization, but that when he has once acted then it is too late for any such remedy, and therefore a plaintiff's complaint is to be dismissed. In our supporting brief we quoted Mr. Justice Vandeventer's statement in *Pennsylvania* v. *West Virginia*, 262 U. S. 553, that "one does not have to await the consummation of threatened injury to obtain preventive relief." If any statement is in point in the instant case Mr. Justice Vandeventer's statement is in point.

We thought the courts were created for the protection of the rights of litigants—not to be made the means of carrying out unlawful action on the part of administrative officials.

Petitioner has laid the foregoing before this court for the reason that notwithstanding the views expressed by the court below as to the nature of the Board orders, the real

contentions of the parties to this suit will shape the relief to which Petitioner is entitled. If the Board's order is compulsory upon Petitioner as amounting to "compulsory arbitration" and is enforcible against it through administrative or executive action, then Petitioner is entitled as a matter of right to a decree in the pending suit determining its rights with respect to the order, and specifically a judicial determination of the validity of "compulsory arbitration" instituted by the executive branch of the Government without any legislative sanction, of the further question whether the requirement for maintenance of membership and checkoff violate the provisions of the National Labor Relations Act and of any other relevant questions that may be involved. On the other hand, if the order is "advisory" only, in the sense that it is not compulsory upon Petitioner, and is not enforcible against it by administrative or other action, then Petitioner is entitled to a judgment so declaring, even though in such event the constitutional questions, and the question as to any violation of the National Labor Relations Act, raised by the requirement for maintenance of membership and check-off may become academic.

Respondents say (Brief, p. 12) that there is here presented no substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. As pointed out in our petition for certiorari, however, and supporting brief, is it conceivable that in the case of the old *Railroad Labor Board* orders passed upon by this court, this court would have held—had the Declaratory Judgment Act been in effect at the time—that there was no substantial controversy then existing between adverse parties having sufficient immediacy and reality to warrant the issuance of a declaratory judgment? The question, we submit, furnishes its own answer.

Respondents seem to suggest in their conclusion to their brief that because the order here involved was issued by the Board prior to the War Labor Disputes Act the legal questions raised by the entry of the order, its asserted compulsory and binding effect upon Petitioner, and its threatened enforcement, are of little, if any, practical significance. Even there, however, it is essential to that position that Executive Order No. 9370 be inapplicable to the instant order. And as to that Respondents' case stands entirely upon the inadequate affidavit of Mr. Garrison and the Vinson letter.

The action taken by Mr. Vinson in the *E. A. Laboratories* case places a wholly different color upon the instant case than it had when considered and decided by the court below. We must keep in mind that the Board itself has consistently claimed that its orders were enforcible wholly without reference to the War Labor Disputes Act, that it has always professed that it would exert every effort possible to bring about compliance, that Executive Order 9370 is not specifically limited to orders entered pursuant to the War Labor Disputes Act, that the executive branch of the Government and particularly the Department of Justice, insist that the President's constitutional powers, wholly apart from the War Labor Disputes Act, fully authorize not only Board orders but also their enforcement, and that the clear import of the Government's petition for certiorari in the current *Ward* case (No. 949, this term) is that the War Labor Disputes Act is merely supplementary to and confirmatory of the President's powers otherwise existing. (p. 16.)

In the *Motor Carriers* case the court below said, with reference to Executive Order No. 9370, that the Board had not reported or threatened to report appellants' failure to comply with its order. (143 F. (2d) p. 145.) And it was accordingly said that that order was irrelevant. Neverthe-

less it added by way of dictum that Executive Order 9370 applied only to Board orders issued under War Labor Disputes Act. At the time the *Motor Carriers*, the *Ward*, and the instant cases were decided by the court below there had been no public announcement of any action by Mr. Vinson pursuant to Executive Order 9370. Had the action taken in the *E. A. Laboratories* case been an established fact at the time the three cases were decided, we question whether the conclusion of the court below would have been the same.

It is significant that nowhere in Respondents' brief is there any attempt made to show why an order of the Board claimed to be enforcible by administrative action is not subject to judicial scrutiny and review, nor is there any denial in Respondents' brief that the Board and the chief law officers of the Government assert the enforcibility of Board orders by administrative action—by plant seizure, by the imposition of sanctions under Executive Order 9370, or in any other manner deemed desirable. The question which Respondents say is involved in the proceeding below and in this court is a mere abstraction. It is a straw man which Respondents have set up solely for the purpose of being knocked down.

As Petitioner has endeavored to state in its petition for certiorari and supporting brief, it is not at this moment a question of how these grave questions should be decided. It is rather as to whether Petitioner should be denied its day in court for a determination of those questions and to have appropriate preventive relief if those questions are decided in its favor.

The plain fact of the matter is that the court below decided a false issue. The real issues should be passed upon by the courts below and ultimately by this court.

Petitioner therefore renews its prayer that certiorari be granted.

Respectfully submitted,

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APPENDIX.

ADVANCE RELEASE
Kelly—76961 OWI-4058

OFFICE OF ECONOMIC STABILIZATION

ADVANCE RELEASE:
For Thursday Morning Papers
February 15, 1945

Cleared and Released
Through Facilities of the
Office of War Information

The Office of Economic Stabilization today made the following statement:

The Director of Economic Stabilization, Fred M. Vinson, today announced that he had directed the cancellation of the war contracts of, and priority assistance to, E. A. Laboratories, Inc., of Brooklyn, New York. This action was taken pursuant to Executive Order No. 9370.

The National War Labor Board reported to the Director of Economic Stabilization that the E. A. Laboratories, Inc. had refused to comply with a directive order of the board. (The nature of the Board's order and the reasoning of majority and minority members of the board have already been presented in WLB press release numbered B-1830A for release on January 23, 1945.)

After this non-compliance case was called to the attention of the Office of Economic Stabilization, this office obtained reports on the nature and importance of the company's products from the War Department, the Navy Department, and the War Production Board. Acting upon this information and exercising his responsibilities under Executive Order No. 9370, the Director ordered the cancellation of contracts and priorities.

Executive Order No. 9370 reads, in part:

> AUTHORIZING THE ECONOMIC STABILIZATION DIRECTOR TO TAKE CERTAIN ACTION IN CONNECTION WITH THE ENFORCEMENT OF DIRECTIVES OF THE NATIONAL WAR LABOR BOARD
>
> "In order to effectuate compliance with directive orders of the National War Labor Board in cases in which the Board reports to the Director of Economic Stabilization that its orders have not been complied with, the Director is authorized and directed, in furtherance of the effective prosecution of the war, to issue such directives as he may deem necessary:
>
> "(a) To other departments or agencies of the Government directing the taking of appropriate action relating to withholding or withdrawing from a noncomplying employer any priorities, benefits or privileges extended, or contracts entered into, by executive action of the Government, until the National War Labor Board has reported that compliance has been effectuated; * * *."

The Director of Economic Stabilization on January 31, 1945, addressed letters to the War Department, Navy Department and the War Production Board. The first four paragraphs, identical in all of the letters, follow:

> "The National War Labor Board, pursuant to Executive Order No. 9370, has referred to this office the case of E. A. Laboratories, Inc., in which the employer has persistently refused to comply with the Board's Directive Order (E. A. Laboratories, Inc., Case No. 111-11443-D).
>
> "The refusal of this employer to comply with a directive order of the National War Labor Board is detrimental to the government's wartime labor relations program. The orderly settlement of labor disputes is an integral part of the war effort.
>
> "I hereby find that the effects of this employer's refusal to comply with the Board's Directive Order threaten to delay and impede the effective prosecution of the war.

"I am informed by the War Department with respect to this employer 'that its production for the War Department could be absorbed by other firms if necessary. It follows, therefore, that any action which you might take under Executive Order No. 9370, including the denial of materials or services to this company or an order to the War Department to cancel contracts with the company, would not adversely affect any War Department supply program.' I am also informed by the Navy Department that 'cancellation of the company's contracts would not appear to interfere unduly with the war effort.' "

The Army and Navy letters continued:

"Under such circumstances, continued contractual relations between government procurement agencies and this employer would tend to impede rather than to promote the effective prosecution of the war and to defeat rather than to serve the public interest.

"Therefore, pursuant to Executive Order No. 9370, I hereby direct the Navy Department/War Department, unless the National War Labor Board shall report to it on or before February 10, 1945, that this employer is in compliance with the Board's Directive Order, to cancel or cause to be cancelled, all contracts of this employer as rapidly as possible."

The War Production Board letter continued:

"Under these circumstances, I find that the allocation to this employer of materials in short supply, or the extension of priority assistance to this employer would delay and impede rather than promote the effective prosecution of the war; and would be contrary to the requirements of the national defense and the public interest.

"Therefore, pursuant to Executive Order No. 9370, I hereby direct the War Production Board, unless the National War Labor Board shall report to it on or before February 10, 1945, that this employer is in compliance with the Board's Directive Order, to deny this employer all applications for priority assistance or for

the allocation of materials which are in short supply, and to cancel all outstanding priorities and allocations."

The courts have frequently decided that no individual or corporation has a legal right to a government contract; and certainly no employer who defies the Government's machinery for the settlement of labor disputes can claim such a legal right.

Likewise, with respect to materials and facilities in short supply, the Second War Powers Act provides that the President, or those to whom he delegates this authority "may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense." In Executive Order No. 9370, the President has determined that the allocation of critical materials or facilities to those who refuse to abide by the legally authorized determinations of the National War Labor Board is not "necessary or appropriate in the public interest and to promote the national defense."

Action is not taken under Executive Order No. 9370 if it will unduly impede the war effort. That principle—the protection of the war effort—has been the keystone around which the government has carried on its efforts to secure compliance with National War Labor Orders.

Every defiance of an order of the National War Labor Board is a threat to war production. Every case of noncompliance disrupts the wartime machinery for the orderly settlement of labor disputes. Every time that orderly process is disrupted there is a loss in the effectiveness of the underlying pledge given by management and labor—that there will be no lockouts and no strikes. If one of the disputing parties has waited patiently through the attempts at conciliation, through the certification of the dispute to the

board, through the collection of data and the presenting of evidence, through the hearings and filing of briefs, through the appeal and consideration of the board, and then the decision of that board is not respected by the other party, he can well ask where did all of my patience and effort lead? And others can ask, why utilize that machinery? After a procedure such as this, and after it has become apparent that one of the parties will not comply, the Government must begin to consider measures to obtain compliance.

Persuasion accomplishes compliance in a remarkable number of cases. But with celebrated instances of defiance, it has been less successful of late.

If an actual interruption occurs, or a threat to interruption in production becomes imminent in a plant highly important to the war effort, the usual course has been Government possession and operation under the Smith-Connally Act and under the constitutional powers of the Commander-in-Chief.

Government possession and operation is not always the answer. The Government is reluctant to seize. But it is inexcusable not to exercise all of our powers to prevent the war machine from coming to a halt. Government possession and operation, however, can be the answer in only a few cases. The Government cannot run numerous plants. In some respects the seizure method is easy; it can be quick; it bypasses painstaking work in trying to figure out some other means of securing compliance, but so far it has not and it must not become an opiate for all of our non-compliance troubles.

The other weapon in our arsenal at present is Executive Order No. 9370. We also have hesitated to use it freely. Sometimes, at least from the financial viewpoint, it is much more severe than seizure.

Executive action, however, does not fully cover the field, and sometimes where it does a better method can be imagined. The better method would be a congressional act which would provide for penalties enforceable by the judiciary for noncompliance with National War Labor Board orders.

This problem is critical and I hope that such legislation, already requested by Justice Byrnes, will be considered soon.

End of ADVANCE RELEASE: FOR THURSDAY MORNING Papers, February 15, 1945.

Office - Supreme Court, U. S.
FILED
APR 6 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 857

UNITED STATES GYPSUM COMPANY, A CORPORATION,
Petitioner,

vs.

NATIONAL WAR LABOR BOARD, ET AL.,
Respondents.

PETITION FOR REHEARING.

JOSEPH H. BATT,
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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 857.

UNITED STATES GYPSUM COMPANY, A CORPORATION,
Petitioner,

vs.

NATIONAL WAR LABOR BOARD, ET AL.,
Respondents.

PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

Petitioner respectfully asks that the court reconsider its denial of Petitioner's petition for writ of certiorari. Petitioner must continue to insist that the refusal of the court below, now confirmed by denial by this court of certiorari herein, to permit the entry of any sort of a decretal order defining the rights of Petitioner with respect to the Board's order here involved places Petitioner in extreme jeopardy. The effect of the order of the court below is to permit action by Respondents, or at their instance, for the enforcement of the order without remedy to Petitioner until after the action has been had and the damage resulting therefrom has occurred. Neither Petitioner nor its counsel has any power of prophetic foresight so as to foresee or anticipate enforcement action by Respondents, or at their instance, far enough ahead so as to permit further application to this court or to the court below or to the District Court for preventive relief. Sanctions may be imposed pursuant

to Executive Order No. 9370 with or without notice to Petitioner—depending upon the arbitrary determination of the Director of Economic Stabilization. If such sanctions are imposed—and Petitioner has no reason to suppose that they will not be in view of the direction contained in Executive Order No. 9370 by the President to impose such sanctions for noncompliance with an order of the Board—the damage and loss will have ensued and Petitioner will have been irreparably injured without the slightest opportunity to it to have its legal rights determined by the courts in time to prevent such damage, loss, and injury even though the imposition of the sanctions should ultimately be held to be unlawful.

While, as Petitioner has heretofore taken occasion to point out, courts, and this court at times, have held their hand upon the engagement of counsel that the threatened action would not be taken, there is in the instant case no such engagement on the part of Respondents or their counsel, the Department of Justice. The record is plain that notwithstanding the contentions advanced in the instant case in Respondents' motions to dismiss or for summary judgment, their purpose elsewhere than in the halls of justice is persistently to enforce Board orders by executive action.

We respectfully ask the court, among other things, to reconsider the question as to whether Petitioner is not entitled as of right to a declaratory judgment determining Petitioner's rights and liabilities with respect to the Board's order here in question. With all due respect to the court, Petitioner would have supposed that the Declaratory Judgments Act was intended for just such a purpose as is evidenced in the instant case.

Petitioner further asks the court to bear in mind that if the *Ward* case, in which certiorari has also been denied, ultimately comes before this court for decision, the Government may be compelled to take an unequivocable posi-

tion so as to require a specific determination by this court as to the enforcibility of Board orders—even though entered prior to the enactment of the War Labor Disputes Act—whether such enforcement be by judicial process or by executive action. Whatever may be the views expressed in the three opinions of the court below involving Board orders, there is nothing in any order or judgment of the court below, and there will be nothing in any order entered in the District Court pursuant to the mandate of the court below, to preclude Respondents or the Government from taking any other or varying position they please with respect to the enforcibility of Board orders. Had judgment been entered in the instant case, whether by way of injunction or by way of declaratory judgment, declaring the unenforcability of the Board's order here involved, then Petitioner, as to such matter, would not, and could not, we believe, be affected by any radical change of position on the part of Respondents or the Government. In the state of the record as it now stands, however, and unless the judgment of the court below is reversed, Petitioner stands at the mercy of Respondents.

Under the circumstances Petitioner therefore respectfully asks the court to set aside its denial of Petitioner's petition for certiorari and to grant the same.

Respectfully submitted,

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Washington, D. C.,

JOHN E. MACLEISH,
LELAND K. NEEVES,
CHARLES M. PRICE,
Chicago, Illinois,
Attorneys for Petitioner.

The undersigned, being one of counsel for Petitioner herein, certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

LELAND K. NEEVES.